

***United States Court of Appeals
for the
District of Columbia Circuit***



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BRIEF FOR APPELLANT

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IN THE
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 24,601

JAMES F. McCONVILLE, Appellant,

v.

OBLATE COLLEGE, Appellee.

Appeal from the United States District Court for the
District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 1 1970

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BRIEF FOR APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the relationship between Plaintiff and Defendant that of independent contractors or that of employer-employee?
2. Is not undisputed documentary evidence establishing the nature of the relationship between the Plaintiff and Defendant entitled to greater weight than oral testimony?
3. In its dealings with Plaintiff, is not the conduct of the Defendant persuasive evidence as to the true nature of the relationship

between the parties?

4. Whether the Findings of Fact and Conclusions of Law of the Court below are supported by the evidence in the record.

5. Whether under the evidence before the Court below it erred in finding as a fact and conclusion of law that "... it matters not whether the Plaintiff was an independent contractor or an employee..."

6. Whether based on the evidence before the Court below it erred in finding as a fact that Plaintiff is not entitled to any recovery under the stipulation entered into by the parties.

This case has not heretofore been before this Court.

REFERENCES TO RULINGS

1. The Court's finding that Father Martin Walsh, the Superior of the college [Oblate], hired the Plaintiff on an experimental basis to assume the responsibility of managing the kitchen, purchasing the food, employing the personnel, and serving the food and otherwise taking over the operation of the food services of the college, and that this arrangement was for an indefinite period and at the will of the parties is contained in the Findings of Fact and Conclusions of Law at page 8 of the Appendix.

2. The Court's finding that the Plaintiff regarded this arrangement and this position at the college as an opportunity to get into

business for himself is contained in the Findings of Fact and Conclusions of Law at page 9 of the Appendix.

3. The Court's findings that the Plaintiff at the time of the arrangement with Oblate College was personally without funds with which to carry on the operation that he had undertaken and that he lacked contact with the food suppliers and other suppliers, and that in order to provide Plaintiff with working capital and to enable him to make the proper contacts with those food suppliers and other merchants, the college bursar agreed with him to advance the sum of \$1,295 per week for a period of several weeks, and that the amount of \$1,295 had been arrived at on the basis of a sample budget that had been submitted by Plaintiff to the bursar of the college [Oblate] and subsequently approved by the Superior are contained in the Findings of Fact and Conclusions of Law at page 10 of the Appendix.

4. The Court's finding that the sample budget did not involve nor set forth terms and conditions of weekly payments that were to be made to the Plaintiff is contained in the Findings of Fact and Conclusions of Law at page 10 of the Appendix.

5. The Court's finding that the Plaintiff did not submit monthly statements and that the Defendant did not regularly reimburse the Plaintiff on a monthly basis as was provided, and that Defendant did not make weekly payments in the amount of \$135 to the Plaintiff, is

contained in the Findings of Fact and Conclusions of Law at page 10 of the Appendix.

6. The Court's finding that during the period February 27, 1967, and January 15, 1968, Plaintiff incurred bills and made expenditures for food, materials, repairs, supplies and payrolls in the total amount of \$35,449.43, is contained in the Findings of Fact and Conclusions of Law at page 11 of the Appendix.

7. The Court's finding that the Defendant did not pay all of the bills he incurred and that it has been stipulated that the Defendant made indirect payments for an on behalf of the Plaintiff in the amount of \$5,364.68, and that Defendant made direct payments to the Plaintiff in the amount of \$37,847.83, or a total of \$43,212.51, is contained in the Findings of Fact and Conclusions of Law at pages 11-12 of the Appendix.

8. The Court's finding that the evidence shows that the arrangement between the Plaintiff and the Defendant continued in existence for a period of 46 weeks and that Plaintiff was absent for five weeks from mid-October through November, 1967, and presented no statements either for reimbursement or salary during that period, or for the month of October, 1967, and that on the basis of this record, Plaintiff has to be compensated for 41 weeks at the rate of \$135 per week which the Court finds to be \$5,535 is contained in the Findings of Fact and Conclusions of Law at page 12 of the Appendix.

9. The Court's finding that when the sum of \$5,535 is added to the expenditures and obligations made by the Plaintiff that the total amount due to Plaintiff for reimbursement plus compensation, during the period between February 26, 1967, and January 15, 1968, is \$40,984.43, and that, therefore, there is no amount that is due and owing to the Plaintiff from the Defendant, is found in the Findings of Fact and Conclusions of Law at page 12 of the Appendix.

10. The Court's finding that there was no agreement to pay the Plaintiff the sum of \$1,295 per week and that the hiring of the Plaintiff was for an indefinite period of time and that it matters not whether Plaintiff was an independent contractor or an employee, and that the Court concludes as a matter of law that the Plaintiff has not established by a preponderance of the evidence that there has been a breach of contract and that the Defendant is indebted to him, is contained in the Findings of Fact and Conclusions of Law at pages 12 and 13 of the Appendix.

STATEMENT OF THE CASE

This is an appeal from an Order entered on April 30, 1970, by the United States District Court for the District of Columbia dismissing Plaintiff's complaint seeking recovery of damages resulting from breach of contract by Defendant. The case was tried by the Court below without a jury. The Court's Findings of Fact and Conclusions

of Law were filed on the 23rd day of April, 1970. (App. 6-13) On the 15th day of May, 1970, the United States District Court for the District of Columbia entered an Order granting Defendant's Motion to amend the Court's Findings of Fact and Conclusions of Law. The Notice of Appeal was filed on the 11th day of June, 1970. A Motion for Extension of Time, or until the 2nd day of December, 1970, within which to file this Brief and Appendix has been granted.

For approximately three years prior to the 20th day of February, 1967, Plaintiff was employed as Manager of the cafeteria of the Shrine of the Immaculate Conception, located in Washington, D. C. While so employed, Plaintiff made the acquaintance of several of the officials of Oblate College which was located immediately across the street from the Shrine Cafeteria. One of these officials was Father Richard Murphy, President of Oblate College. Sometime during the month of January, 1967, Father Richard Murphy approached the Plaintiff suggesting the possibility of an arrangement whereby Plaintiff would provide all of the services in connection with the serving of food at Oblate College. During these initial conversations, Father Richard Murphy, President of Oblate College, represented to Plaintiff that this would be an excellent opportunity for him to go into business for himself.

(Tr. 22, April 20, 22, 23, 1970)¹ This prospect appealed to Plaintiff, and after considering the offer, he notified his employer that he intended to resign and thereupon gave two weeks notice. As manager of the cafeteria at the Shrine of the Immaculate Conception, Plaintiff's salary was \$135 for a six day week. As of this time, Plaintiff's experience in the food industry had extended over a period of approximately twenty years. (Tr. 33, April 21, 1970, Vol. II, App. 43)

On or about the 20th day of February, 1967, and by pre-arrangement, Plaintiff met with various officials of Oblate College for the purpose of discussing the terms and conditions under which Plaintiff was to provide all of the services in preparing and serving three meals each day, seven days per week, to approximately 65 to 70 students then enrolled in Defendant's educational facility. The officials of Oblate College who were present at this meeting were

1 References in this brief to materials in the Appellant's Appendix will be identified by the abbreviation App., followed immediately by the page therein where the reference begins. Exhibits which are reproduced in the separate volume identified as Appellant's Appendix--Exhibits, will be designated as P.'s Exh. 1, App. 1. References to testimony not reproduced in Appellant's Appendix will be identified by reference to the page number in the Reporter's official transcript; transcript will be abbreviated Tr. Exhibits not reproduced in Appellant's Appendix and, therefore, not referenced, are available for examination in the record room of this Court. By reason of the fact that there is some confusion in the pages of the official transcripts of the proceedings, references to transcripts will specify the volume number, when so indicated, and the respective dates on which the hearing was held.

Father Richard Murphy, President; Father Martin Walsh, Superior of the College; Father John Walsh, Bursar; also present were Father Hanley and Father McGuire, whose official titles have not been designated. (Tr. 55, April 21, 1970, Vol. II) Pursuant to a request made by Father Richard Murphy prior to this meeting, Plaintiff prepared a sample budget, on a weekly basis (P.'s Exh. 1, App. 64). This sample budget reflected the total sum of \$1,295 per week as the amount agreed upon to be paid to Plaintiff for preparing and serving three meals each day, seven days per week, to approximately 65 to 70 students, including Plaintiff's expenses in the form of wages to be paid to his employees and the costs of linens and repairs. This sample budget was presented to the officials of Oblate College at the meeting held on or about the 20th of February, 1967. At this same time, Plaintiff also submitted a sample menu for the consideration of the officials of Oblate College. (P.'s Exh. 2, App 65) This contract between Plaintiff and Defendant was for a period of one year commencing on the 27th day of February, 1967, and terminating on the 26th day of February, 1968.

During the period beginning February 27, 1967, to and including the 27th day of March, 1967, Defendant made five regular weekly payments to the Plaintiff in the sum of \$1,295 as provided for under the agreement entered into between the Plaintiff and the Defendant. Subsequently, and throughout the remainder of the term of the contract,

Defendant failed to make the regular weekly payments of \$1,295 and, in lieu thereof, made payments at irregular intervals to Plaintiff in varying amounts, sometimes in excess of \$1,295 and in other instances less than \$1,295. (Addendum 3 a, 4 a, and 5 a)

On or about the 15th day of January, 1968, without notice, and prior to the expiration of the contract, Defendant notified Plaintiff that it did not intend to continue the arrangement with Plaintiff. (App. 57)

By reason of the fact that Plaintiff undertook to purchase all food on his own account and to hire all employees in the conduct of his business (App. 51-52), Plaintiff was required, by law, to obtain a D. C. Business Tax Registration Number (P.'s Exh. 33, App. 91); the District of Columbia issued to Plaintiff an Unincorporated Business Franchise License (P.'s Exh. 34, App. 92); and the U. S. Department of Labor issued to Plaintiff a Certificate certifying that Plaintiff had secured payment of compensation in compliance with the District of Columbia Workmen's Compensation Act (P.'s Exh. 35, App. 92-93). In operating his business, Plaintiff traded as "Food Services and Consultant" with Offices located at 391 Michigan Avenue, N. E., Washington, D. C., the same being the address of Oblate College. In so operating his business, Plaintiff complied with the applicable provisions of both the Internal Revenue Code and the Federal Insurance Contributions Act as they relate to withholding taxes and Social Security payments. Plaintiff was listed in the Chesapeake & Potomac Telephone Directory as "Food Services and

Consultant" (App. 62).

For the period February 27, 1967, to January 15, 1968, payments made directly to Plaintiff by Defendant totaled \$37,847.83; after January 15, 1968, Defendant discharged Plaintiff's obligations to his trade accounts in the sum of \$3,813.81; for the month of November, Defendant made direct payments to Plaintiff's employees in the sum of \$1,550.87. The parties have stipulated that the sum of \$43,212.51 represents total payments made by Defendant to Plaintiff, directly and indirectly. (Tr. 3, April 20, 1970) From February 27, 1967, to January 15, 1968, the sum of \$35,449.43 represents amounts paid by Plaintiff for food supplies, wages, linens and repairs. Subsequent to January 15, 1968, Embassy Dairy filed a suit against Plaintiff in the amount of \$569.48. (App. 41) The total operating costs incurred by Plaintiff aggregates the sum of \$36,018.91. From February 27, 1967, to January 15, 1968, Plaintiff received the sum of \$37,847.83 directly from Defendant, resulting in a net income of only \$1,828.92 from his business. (App. 40-42) At the rate of \$1,295 per week from February 27, 1967, to January 15, 1968, or a period of 46 weeks, the amount due and owing to the Plaintiff by Defendant aggregates the sum of \$59,570 less the sum of \$43,212.51 comprising payments made directly and indirectly by Defendant to the Plaintiff; the difference between the sum of \$59,570 representing the gross amount due from Defendant to Plaintiff, and the sum of \$43,212.51, representing the gross amount paid directly and indirectly to Plaintiff, or \$16,357.49, constitutes the amount to which

Plaintiff is entitled under his contract with the Defendant, For the remainder of the one year term, or a period of six weeks, the estimated loss of profits for that period approximates the sum of \$2100. Accordingly, therefore, as the result of Defendant's breach of contract, the damages for which Plaintiff seeks recovery total \$18,457.49.

SUMMARY OF ARGUMENT

The Court below erred in ruling that it matters not as to whether Plaintiff was an independent contractor or an employee.

Documentary evidence establishing that the Government of the District of Columbia assigned a Business Tax Registration Number and issued an Unincorporated Business Franchise License to Plaintiff, including a Certificate of Compliance with the District of Columbia Workmen's Compensation Act, convincingly demonstrates that Plaintiff was an independent contractor.

The conduct of Defendant in making five consecutive payments in the amount of \$1,295 per week, commencing with February 27, 1967, in the exact amount designated in the sample budget presented by Plaintiff to Defendant at the meeting held on or about February 20, 1967, is persuasive evidence that Defendant recognized its obligations to pay to Plaintiff the sum of \$1,295 per week as set forth in that sample budget.

Assuming, arguendo, that Plaintiff was an employee, he would, nevertheless, be entitled to a minimum of \$135 per week for a period of not less than 41 weeks, or a total of \$5,535. As an employee, he is not legally liable for the payments made directly to merchants for food supplied to and consumed by Defendant; nor, as an employee, would Plaintiff be legally chargeable for wages paid to employees who prepared and served the food consumed by the Defendant.

The Defendant would be entitled to a credit of \$5,364.68, consisting of payments made directly to Plaintiff's creditors and employees in the respective sums of \$3,813.81 and \$1,550.87, only in the event Plaintiff is deemed to be a sole proprietor; inasmuch as the Court below found, as a matter of law, that Plaintiff was an employee, it erred in charging Plaintiff with the receipt of \$5,364.68. This sum was never paid to Plaintiff and the fact that the Stipulation stated that such payment was made for the benefit of Plaintiff demonstrates that for one purpose the Court below regarded Plaintiff as a sole proprietor and for other purposes it treated Plaintiff as an employee. Under no circumstances, therefore, is Defendant entitled to a credit of \$5,364.68 if Plaintiff is held to be an employee.

The Court below erred in ruling that it matters not as to whether Plaintiff was an independent contractor or an employee.

ARGUMENT

I. THE RELATIONSHIP BETWEEN PLAINTIFF AND DEFENDANT
WAS THAT OF INDEPENDENT CONTRACTORS

The documentary evidence conclusively establishes that the relationship between the Plaintiff and the Defendant was that of independent contractors. The Plaintiff hired his own employees and paid their wages. (App. 51) He withheld taxes on their wages as required under the provisions of the Internal Revenue Code and likewise complied with the pertinent provisions of the Federal Insurance Contributions Act. (App. 62-63) He complied with the laws of the District of Columbia in obtaining an Unincorporated Business Franchise License and he was issued a Certificate of Compliance with the District of Columbia Workmen's Compensation Act. (P.'s Exhs. 34, 35, App. 92-93) Plaintiff held himself out as a food consultant and traded as "James F. McConville Food Services and Consultant." Such conduct on his part was open and notorious throughout the entire period from February 27, 1967, to and including January 15, 1968. With Defendant's full knowledge he operated and conducted his business at an office located in the Defendant's facility. (App. 62) The Defendant admitted that it did not pay to Plaintiff a specified weekly salary and that it did not withhold on such salary nor did it make payments in compliance with the Federal Insurance Contributions Act. (App. 15, 16, 18, and 19)

The Defendant cannot avoid its obligations by the tenuous claim that Plaintiff was supposed to pay himself a salary and to withhold on his salary and to make payments under the Federal Insurance Contributions Act for his own benefit. Moreover, under the principles of law applicable to employer-employee relationships, the employee is not the guarantor of the employer's debts to its creditors. Defendant's contention that it advanced the sum of \$1,295 per week for a period of five weeks in order to provide Plaintiff with sufficient cash flow (App. 23) because of his lack of capital, is inherently contradictory to a relationship existing between an employer and his employee. It is a fundamental principle of law that the element of an employer-employee relationship is that the employer controls the place and hours of employment and the employee performs services for fixed wages payable at fixed periods. The employer controls the payment of the wages and he supervises the work and directs the manner in which it is to be performed. There is no legal responsibility on the part of an employee to assume the debts incurred by his employer in the operation of the employer's business. Under the provisions of Sections 3402 and 3403, Internal Revenue Code, 1954, the employer is charged with the responsibility of withholding income taxes and for making payments therefor to the Internal Revenue Service. (Addendum 1a-2a)

In finding that the Plaintiff was hired by the Defendant, the

Court below has either ignored or countenanced the fact that Defendant violated Federal income tax laws, the Federal Insurance Contributions Act, and the District of Columbia Workmen's Compensation Act.

(App. 15-16)

It is extremely unlikely that the top echelon of Oblate College, namely the President, Father Superior, Bursar, and at least one other official would hold a meeting for the mere purpose of hiring an employee for \$135 per week. On the contrary, it is far more plausible that these officials held such a meeting for the purpose of offering Plaintiff a firm commitment as a food concessionaire at an agreed weekly payment which was considerably less than the heavy costs which they had been incurring in using the services of a food caterer. (Tr. 105, April 20, 1970; App. 23 and 42) It should be noted that the Plaintiff paid his chef \$120 per week. (Tr. 6, April 20, 22, 23, 1970) Under such circumstances, reason is strained beyond its breaking point to conclude the Plaintiff would undertake to provide all of the services incidental to the procurement, preparation and serving of three meals a day, seven days per week to 65 or 70 students of Oblate College, and to assume the legal obligation for the payment of all food purchased from various merchants including the responsibility for the hiring, supervising, and paying of all employees in this kind of operation for \$135 per week. Prior to entering into this contract with Oblate College, Plaintiff had been employed at the

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Shrine Cafeteria at \$135 per week for six days a week and did not assume the legal obligation of paying his employer's creditors. It is not only unreasonable, it is unrealistic, to conclude that Plaintiff undertook such tremendous obligations unless he had been assured that the operation in which he was to become engaged would be his own business.

In a recent decision, the District of Columbia Court of Appeals was called upon to decide the question as to whether or not a dance instructor was an employee or an independent contractor, Dmitrieff v. Campbell, 234 A.2d 808 (1967). In that case, the evidence showed that plaintiff gave ballet lessons at defendant's studio and that the tuition for the lessons was collected by the defendant's studio which retained one-third of such tuition and gave the balance to the plaintiff without deducting Social Security or withholding taxes. Under those facts, the District of Columbia Court of Appeals held that plaintiff was not defendant's "employee." In the present proceeding, the Defendant admits that it did not deduct Social Security or withholding taxes and did not make payments pursuant to the District of Columbia Workmen's Compensation Act. In the case under review, Plaintiff hired his own employees, paid their salaries on which he withheld income taxes and paid Social Security taxes; he applied for and obtained a District of Columbia Unincorporated Business Franchise License and a Certificate of Compliance with the

District of Columbia Workmen's Compensation Act; in Dmitrieff v. Campbell there was no such evidence.

II. THE DETERMINATION OF THE RIGHTS, DUTIES, AND
OBLIGATIONS OF THE RESPECTIVE PARTIES DEPENDS
UPON THEIR LEGAL RELATIONSHIP

In determining the rights, duties, and obligations of the Plaintiff and Defendant, it is necessary, of course, to define their legal relationship. If such relationship was that of employer-employee, the principle of law applicable to employment contracts would control. If the relationship was that of independent contractor, different principles of law would apply. In his findings, the trial judge ruled that "it matters not whether Plaintiff was an independent contractor or an employee." This portion of the Court's findings raises a question of substantive law. The Court below failed to specify or otherwise explain the reasoning employed in reaching such a conclusion. In Plaintiff's view, it makes a great deal of difference as to whether he is an independent contractor or an employee.. In reality, the Court below simply avoided the very issue presented for its determination. Even if it is conceded that the contract between Plaintiff and Defendant was one at will, it still remains necessary to determine whether or not it was an employment contract or one between two independent contractors. Accordingly, therefore, it is respectfully submitted that the Court below failed to resolve the basic

question with which this proceeding is concerned.

When the Court's Findings of Fact and Conclusions of Law are subjected to critical examination, the following factors reveal themselves:

(a) The Court found that "... the Superior of the College hired the Plaintiff on an experimental basis to assume the responsibility of managing the kitchen, purchasing the food, employing the personnel, and serving the food and otherwise taking over the operation of the food services of the college. " (App. 8) One salient aspect to which the Court made no reference is that the Plaintiff also assumed the responsibility of paying the Defendant's creditors; this fact alone negates the existence of an employer-employee relationship. Inasmuch as an individual contractor is not hired, the Court has found, as a matter of law, that Plaintiff was an employee.

(b) The Court below found that "Under the terms of the hiring, the Plaintiff was to assume the overall operation of the kitchen, and dining room facilities of the college, and as I have indicated already, the hiring and supervision and payment of all necessary personnel, the procurement and payment for all foods, materials and other supplies necessary for the operation of the kitchen and dining room facilities of the college, the preparation and submission for approval by the college representatives of prospective menus, and the preparation and serving

of three meals per day for approximately sixty five to seventy persons." (App. 8-9) In this finding, the Court concluded that the hiring required Plaintiff to assume the responsibility for the procurement and payment for all foods purchased from various suppliers, but it neglected to mention the fact that the relationship between Plaintiff and such food suppliers was that of independent contractors. (P.'s Exhs. 39, 40 - App. 99) The fact that Plaintiff dealt directly with those merchants is clear proof in support of the fact that Defendant engaged Plaintiff as an independent contractor and not as a mere employee. Defendant was well aware of the fact that these food suppliers did not sell and deliver the food and other supplies to Plaintiff as one of its employees. The Defendant had full knowledge of the fact that Plaintiff was dealing with the food suppliers as an independent contractor. (App. 39) Having acquiesced in this arrangement, Defendant is now estopped to deny that Plaintiff was operating his business as an independent contractor.

(c) The Court below found that "the Plaintiff under the terms of the hiring was to submit to the Defendant monthly verified and detailed statements of the expenditures made by him and the bills incurred by him in the execution of his responsibilities to the college during the preceding month. On its part the college agreed to reimburse the Plaintiff for those expenditures and the amount of the bills that were incurred by him in accordance with the monthly expense statements which the Plaintiff

was required to furnish, and further agreed to compensate the Plaintiff for his services at the rate of one hundred and thirty-five dollars per week." (App. 9) This finding can only be supported by either distorting, to a considerable degree, the actual evidence, or by drawing unreasonable and unrealistic inferences therefrom, or a combination of both. To illustrate the fact that the evidence must be distorted to reach such a finding, it is only necessary to refer to the testimony of Defendant's witnesses; by so doing, it will be found that they consistently stated that Defendant did not withhold taxes on Plaintiff's wages and that it did not make deductions pursuant to the Federal Insurance Contributions Act or make payments under the provisions of the District of Columbia Workmen's Compensation Act. This testimony, of course, should preclude a finding that Plaintiff was an employee; even if this fact is ignored, as did the Court below, the record is completely devoid of any evidence that Defendant agreed to reimburse Plaintiff for the wages he was obliged to pay to his employees.

As to that portion of the Court's conclusion that Plaintiff was to be compensated for his services at the rate of \$135 per week, the evidence unquestionably shows that at no time did Defendant ever pay Plaintiff \$135 a week, or, for that matter, at any other specified period of time. (App. 18-19) Moreover, the record shows that the Bursar of Oblate College, Father John Walsh, testified that the sum of \$1,295 per week

did not include salary to the Plaintiff. (App. 15) As to the manner or method by which Plaintiff's salary of \$135 per week was to be paid to him, a careful examination of all of the testimony presented by Defendant's witnesses fails to reveal any sensible or plausible explanation; the trial judge, himself, states it was not clear to him. (App. 16)

Despite the plethora of testimony offered by Defendant's witnesses regarding the manner in which Plaintiff was to receive his salary of \$135 per week, such testimony, in Plaintiff's view, defies all attempts at a rational analysis. (App. 27, 28, 29, 34 and 35) To prove that this is not just an idle claim, excerpts from such testimony will serve as an illustration: As an adverse witness, Father Martin Walsh, Superior of Oblate College, was interrogated by Plaintiff's counsel as to the manner in which the sum of \$1,295 per week was determined. At this juncture, it should be remembered that Father Martin Walsh and Father Richard Murphy testified that Plaintiff did not submit the sample budget at the meeting held on or about February 20, 1967 (App. 37; Tr. 115 and 175-176, April 20, 22, 23, 1970); it should also be remembered that Father John Walsh's testimony on this point is contradictory; on one occasion, this witness testified as follows:

By Mr. Simpson:

Q. "Father, I show you Plaintiff's Exhibit No. 1 for identification and ask you if that is the budget that Mr. McConville submitted to you or to the group some time in February, 1967?"

A. "Yes, I recognize that -- there was a sample budget at the time and I believe also that there was a menu, but as far as this was concerned, this didn't concern me at all - I was not interested. The menu, I believe, was the main thing I was concerned about because our agreement had already been made as regarding salary and this budget was not salary included." (Tr. 13-14, April 20, 1970)

On another occasion Father John Walsh testified that the sample budget was not submitted to him by the Plaintiff at the time of "hiring" Mr. McConville. (App. 23)

This witness was further interrogated concerning the payment of \$1,295 per week for the first five consecutive weeks. In that connection, Father John Walsh testified as follows:

By Mr. Simpson:

Q. "Father, I show you Plaintiff's exhibit 3 for identification which purports to be a check for \$1,295 and it is numbered 2431, bearing the signature of Richard J. Murphy, President, and John Walsh --"

A. "OMI"

Q. "I ask you if that is your signature here - 'John Walsh'?"

A. "Yes, it is."

Q. "And it bears date February 27, 1967?"

A. "Right."

Q. "And that check for \$1,295 corresponds with the amount of the sample budget - \$1,295 - does it not?"

A. "Coincidentally, yes, sir."

Q. "Just by coincidence, Father?"

A. "Yes." (Tr. 19, April 20, 1970)

Q. "Father, I show you Plaintiff's exhibit No. 4 for identification purporting to be a check issued by the Oblate College, check No. 2444 in the amount of \$1,295, payable to Thomas (sic. James) McConville, under date of March, 1967, and ask you if that is your signature that appears on the bottom there?"

A. "Yes."

Q. "And this check is exactly one week subsequent to the check to which you have already testified - that is check 2431 - in the amount of \$1,295. I ask you Father: did you have any bills or invoices for the purpose of issuing this check to Mr. McConville - the one of March 6, 1967?"

A. "Er - no. I would say that was just an arbitrary advance, the same as previously."

Q. "And this \$1,295 corresponds with the amount appearing on the sample budget exhibit 1 of the Plaintiff, already introduced in evidence?"

A. "Yes."

Q. "And is it your answer that that \$1,295 is also another coincidence in connection with the sample budget?"

A. "Yes -- m'm."

Q. "I show you Plaintiff's exhibit 5 for identification purporting to be a check drawn by Oblate College under date of March 13, 1967, in the amount of \$1,295, check No. 1294, 2 I believe it is -- is that not correct? 1294-2?"

A. "Correct."

Q. "And I ask you if that signature, 'John Walsh', is your signature?"

A. "Yes."

Q. "And is that the signature of Martin J. Walsh?"

A. "Yes."

Q. "And he was also authorized to issue a check?"

A. "Yes."

Q. "And this check is just one week after the previous check in the same amount of money - and I ask you if your testimony is that this check in the amount of \$1,295 is coincidentally the same as the amount of \$1,295 appearing on the sample budget which is already in evidence as Plaintiff's exhibit 1?"

A. "Yes, it is."

Q. "Purely coincidental?"

A. "Yes."

Q. "Father, I show you Plaintiff's exhibit No. 6 for identification purporting to be a check issued by Oblate College in the amount of

\$1,295 payable to Mr. James McConville under date of March 20, 1967 and this is check 1303-2?"

A. "Yes."

Q. "And I ask you if the signature of John Walsh at the bottom thereof is your signature?"

A. "Yes."

Q. "And in connection with this check is it your testimony that that \$1,295 that you paid to Mr. McConville on this date is coincidental with respect to the sum of \$1,295 appearing on the sample budget introduced into evidence as Plaintiff's exhibit 1?"

A. "Yes."

Q. "Father, I show you Plaintiff's exhibit No. 7 for identification, purporting to be a check issued by Oblate College in the amount of \$1,295 payable to James McConville under date of March 20 --"

A. "Seven is it?"

Q. "March 27, 1967, in the amount of \$1,295, is that correct, Father?"

A. "Yes. Correct."

Q. "And it bears two signatures, that of John Walsh and the other one is Richard T. Hanley?"

A. "Yes."

Q. "Is it your testimony that this check in the amount of \$1,295 is coincidental with the amount on the sample budget which has been

introduced into evidence as Plaintiff's exhibit No. 1?"

A. "Yes."

MR. SIMPSON: "Your Honor, at this time, if there is no objection of counsel, I would like to introduce into evidence the checks just testified to - numbered Plaintiff's 3, 4, 5, 6, and 7 - for identification." (App. 69-70)

THE COURT: "They are admitted if there is no objection."

MR. DELANEY: "No objection, Your Honor." (Tr. 27, 28, 29, 31, April 20, 1970)

If one is willing to accept the fact that the exact amount of \$1,295 paid by Defendant to Plaintiff each week for the first five consecutive weeks was purely coincidental with the amount contained in the sample budget, he is then compelled to accept the fact that the method employed by Defendant in arriving at the amount to be "advanced" to Plaintiff in order to provide him with "sufficient cash flow" (App. 23) to sustain his operation, was, in truth, the real basis upon which Defendant determined the amount of such advance. The testimony of Father Martin Walsh clearly establishes that the average cost of breakfast, lunch and dinner for one person for one day was \$2.85 and that this sum was multiplied by 65 people for seven days a week and that this resulted in the sum of \$1,296.75 and that it was then leveled off at \$1,295 and the Defendant wrote the check for that amount. It is singularly significant

including
What?

that instead of leveling the sum of \$1,296.75 to \$1,297.00, the nearest dollar, the Defendant allegedly substracted \$1.75 in leveling it off to \$1,295.00. (App. 25-26) It is eminently clear that, in making this computation, Defendant made no provision whatsoever for the payment of Plaintiff's salary and it made no allowances for the payment of wages to Plaintiff's employees or for any incidental expenses. This was true notwithstanding the fact that Father Richard Murphy, President of Oblate College, was aware of the fact that the Plaintiff had four employees and that he also knew that Plaintiff was required to pay them. (App. 36) The conclusion is inescapable that Defendant never intended to hire Plaintiff as an employee in the first place; the fact that Defendant made no allocation at all for the payment of Plaintiff's salary or the wages of Plaintiff's employees, and incidental operating expenses, impugns Defendant's own testimony. On the other hand, the sample budget submitted by Plaintiff itemizes the various components comprising the total sum of \$1,295, in this sample budget. (P.'s Exh. 1, App. 64)

Cost of food, est.	\$900
Cost of payroll 4 employees	370
Supplies, linens, soap, etc.	20
Repairs	<u>5</u>
	\$1,295

Condensing the testimony as it relates to the sum of \$1,295, we find that Defendant claims that the sample budget was not presented by

Plaintiff at the first meeting (App. 24) and that the Defendant, after costing food at \$2.85 per person per day, it leveled off the sum of \$1,296.75 to ~~\$1,295~~. (App. 25-26) The cost of the food did not include the payment of Plaintiff's salary, wages to Plaintiff's employees, supplies or repairs; Defendant would have this Court believe that its determination of \$1,295 a week was purely coincidental with the amount set forth in the sample budget submitted by Plaintiff; the Defendant would further have this Court believe that, notwithstanding the fact that Plaintiff was hired as an employee, Defendant found it necessary to advance him sufficient capital in order to provide a cash flow (App. 23) for his operation. According to Defendant, it allegedly advanced capital to an employee and, at the same time, allowed such employee to use its facilities in operating a business of his own. ??

Not only did Father John Walsh testify that payments in the amount of \$1,295 were not only coincidental with the amount reflected in the sample budget, he stated that such payments were arbitrary advances. The testimony of Father John Walsh is quoted verbatim herewith:

By Mr. Simpson:

Q. "And this check is exactly one week subsequent to the check to which you have already testified - that is check 2431 - in the amount of \$1,295. I ask you, Father: did you have any bills or invoices for

the purpose of issuing this check to Mr. McConville -- the one of March 6, 1967?"

A. "Er - no. I would say that was just an arbitrary advance, the same as previously."

Q. "And this \$1,205 (sic. \$1,295) corresponds with the amount appearing on the sample budget exhibit 1 of the Plaintiff, already introduced in evidence?"

A. "Yes." (Tr. 27-28, April 20, 1970)

Father John Walsh also testified that payments in uneven amounts, such as \$1,740.49, \$2,015.61, and \$2,270.18 were arbitrary advances to the Plaintiff. (App. 20, 21, and 22)

III DOCUMENTARY EVIDENCE IS ENTITLED TO GREATER WEIGHT THAN ORAL TESTIMONY

The documentary evidence introduced by Plaintiff in support of his contention that he was an independent contractor may be summarized as follows:

(a) Sample budget prepared by Plaintiff and submitted by him to officials of Oblate College. (P.'s Exh. 1, App. 64)

(b) Business Tax Registration Number assigned to Plaintiff by the Government of the District of Columbia. (P.'s Exh. 33, App. 91)

(c) Unincorporated Business Franchise License issued to Plaintiff by the Government of the District of Columbia. (P.'s Exh. 34, App. 92)

(d) Certificate of Compliance issued to Plaintiff by the Government of the District of Columbia certifying that Plaintiff had complied with the provisions of the District of Columbia Workmen's Compensation Act. (P.'s Exh. 35, App. 92-93)

Although witnesses for Defendant offered considerable oral testimony tending to establish that Plaintiff was an employee, (App. 24-27), these same witnesses, nevertheless, testified quite consistently that Defendant did not withhold taxes on Plaintiff's salary and that it did not make any deductions pursuant to the Federal Insurance Contributions Act. (App. 15-16) The provisions of Title 26, United States Code, Sections 3101 (3) and 3102 are set forth at page 1 a of the Addendum to this Brief. It is apparent that such testimony is consistent with the documentary evidence offered by Plaintiff in support of his contention that he was an independent contractor (App. 43-52). The Findings of Fact and Conclusions of Law as found by the trial judge where he found that "it matters not whether the Plaintiff was an independent contractor or an employee," raises a mixed question of law and fact. Where oral testimony is in conflict with contemporaneous documents, Courts of Appeal will give it little weight particularly when the crucial issues involve mixed questions of law and fact. United States v. United States Gypsum Co., 68 S. Ct. 525; 333 U. S., 364 (1948).

The following questions and answers demonstrate the unreliability of the oral testimony of the Defendant's witnesses:

Witness, Father John Walsh (Bursar of Oblate College), an adverse witness.

By Mr. Simpson:

Q. "Father, I show you Plaintiff's Exhibit No. 1 for identification and ask you if that is the budget that Mr. McConville submitted to you or to the group, some time in February, 1967?"

A. "Yes, I recognize that -- that was a sample budget at the time and I believe also that there was a menu, but as far as this was concerned, this didn't concern me at all - I was not interested. The menu I believe was the main thing I was concerned about because our agreement had already been made as regarding salary and this budget was not salary included." (Tr. 13-14, April 20, 1970)

On cross examination, this witness testified as follows:

By Mr. Delaney:

"Q. In February, 1967, were you requested by your Superior to participate in a meeting with Mr. McConville?"

A. "Yes, sir."

Q. "Who else was present at that meeting?"

A. "Father Superior and Father Murphy."

Q. "And briefly what was the substance of the discussion and the reason the meeting was called?"

A. "To inquire about Mr. McConville's acceptance of this position."

Q. "Was there any arrangement, Father, at that first general meeting arrived at?"

A. "No--nothing." (Tr. 83-84, April 20, 1970)

On cross examination, Father John Walsh later testified as follows:

By Mr. Delaney:

Q. "At this (first) meeting you were not interested in the financial arrangements, were you?"

A. "No." (Tr. 111, April 20, 1970)

Q. "In other words, he (Mr. McConville) did not present that (sic. sample menu - P.'s Exh. 2, App. 65-68) at the meeting?"

A. "No - this was, it was just a meeting to talk over in the beginning - nothing was actually done in that meeting. It was later on it was prepared and spoken about, the advances, the menus, the salaries and everything else."

Q. "So, you were going to advance money to Mr. McConville and also going to pay him a salary in addition to the advance?"

A. "Yes - no, that would be coming out of the advance because at the end of the month there would be a statement to cover that advancement and payments -- in other words, er, Mr. McConville was to receive \$135 a week but that would be included in the end of the month in the statement and the moneys that we were issuing would be subtracted

from that, from the payments, if that were necessary, and so forth."

Q. "He was going to receive \$135 a week total and you were going to advance to him, so that I may be perfectly clear -- Mr. McConville was going to be paid \$135 a week in the gross sum that you would advance to him each week?"

A. "From that gross sum - yes."

Q. "He was to take that out of that advancement of \$135 a week - is that correct, sir?"

A. "He was to take it out at the end of the month not at the end of the week." (Tr. 112-113, April 20, 1970)

(It will be noted that this witness had previously testified that the agreement had already been made regarding salary and that the budget was not salary included.)

Previously, Father John Walsh testified as follows:

By Mr. Simpson:

Q. "Was he (Mr. McConville) to be an employee of the college as manager?"

A. "Yes."

Q. "And to receive \$135 a week?"

A. "Correct."

Q. "And at the time you arrived at that agreement did Mr. McConville submit to you a document known as a sample budget?"

A. "Yes." (Tr. 13, April 20, 1970)

On further interrogation by counsel for Plaintiff, Father John Walsh testified as follows:

Q. "The next check is for \$1200 dated April 10, 1967, and as you know, the difference between March 27, 1967, and April 10, 1967, is two weeks?"

A. "Yes."

Q. "Then what happened to the payment, Father, for April third, 1967?"

A. "There was no agreement for weekly payments."

Q. "No agreement for weekly payments?"

A. "It was an arbitrary agreement, I would advance money if I felt I could."

Q. "Whenever it suited your purpose?"

A. "Yes."

Q. "You would make payments?"

A. "Yes - yes."

Q. "So you didn't make a payment on April 3rd?"

A. "That is correct. As far as I know I did not."

Q. "You did not. Did you pay Mr. McConville his \$135 on April 3, 1967?"

A. "It was not paid weekly. It was taken out at the end of the

month in the aggregate sum of salary when he submitted the statement to me. "

Q. "Oh, he got his salary at the end of the month? "

A. "Correct." (Tr. 33, April 20, 1970)

(This witness had previously testified that Plaintiff was to receive \$135 per week - Tr. 13, April 20, 1970)

Upon questioning by counsel for Plaintiff, Father John Walsh testified as follows:

Q. "You say he (Mr. McConville) was supposed to submit a statement to you each month? "

A. "That is correct. "

Q. "And on what do you base that statement, Father? "

A. "That was the original agreement. "

Q. "The original agreement -- were you present at the time the agreement was made? "

A. "Yes." (Tr. 9, April 20, 1970)

IV. THE FINDING OF THE COURT BELOW THAT "THERE WAS NO AGREEMENT TO PAY THE PLAINTIFF THE SUM OF \$1,295 PER WEEK... " IS NOT ONLY CONTRARY TO THE DEFENDANT'S OWN CONDUCT, BUT IS ALSO CONTRADICTORY TO THE DOCUMENTARY EVIDENCE AND IS CLEARLY ERRONEOUS.

In finding that there was no agreement to pay the Plaintiff the sum of \$1,295 per week, the Court below not only ignored contemporaneous

documentary evidence, it also ignored the Defendant's own conduct. The documentary evidence, heretofore commented upon in paragraph III of Appellant's Argument unquestionably demonstrates that Plaintiff was an independent contractor engaged in the business of food consultant as a sole proprietor.

In addition, thereto, the record contains ample evidence bearing upon Defendant's own conduct. At this juncture, it might be well to comment very briefly in that regard:

7? Commencing on the 27th day of February, 1967, and for each of the five consecutive weeks, Defendant made payments to Plaintiff in the exact amount of \$1,295 as set forth in the sample budget submitted by Plaintiff to Defendant (P.'s Exh. 1, App. 64). Despite Defendant's contention that Plaintiff was entitled to only \$135 per week as an employee, the record is completely devoid of any payment in such amount at any time to the Plaintiff. The only explanation offered by Defendant for its failure to make payments of \$135 per week to Plaintiff as Defendant claims it to be, is that Plaintiff was supposed to take care of salary payments to himself at the end of each month. (App. 19). Such payments on the part of Defendant are not only unrealistic, but contradict its own testimony in this respect. According to Defendant, it had determined the cost of food by adopting the cost per person of \$2.85 per day for three meals a day; by multiplying this sum by 65 persons,

Defendant reached the figure of \$1,296.75 per week as the cost of food (App. 25-26); Defendant was well aware of the fact that Plaintiff was to hire and pay his own employees and that there were at least four employees hired by Plaintiff in operating his business. (App. 36) If Plaintiff was to pay himself \$135 per week and was also responsible for paying his employees (Plaintiff had estimated his cost of payroll to be \$370 per week), it would mean that Plaintiff's salary plus his payroll would aggregate the sum of \$505 per week. This would leave Plaintiff \$790 per week out of which, according to Defendant, he was to purchase and guarantee the payment to food suppliers for food to be consumed by 65 persons per week for seven days a week; at this rate, Plaintiff would incur a deficit of not less than \$505 per week exclusive of the cost of linens and minor repairs and yet witnesses testifying on behalf of Defendant stated that the purpose of advancing \$1,295 a week to Plaintiff was to provide him with capital or cash flow to sustain him in his operation. It is, to say the least, extremely difficult, if not impossible, to understand the necessity for providing Plaintiff with capital funds or cash flow if he had been hired as an employee. The real reason Defendant discontinued making payments at the rate of \$1,295 per week in accordance with the sample budget is the fact that after Plaintiff, as a matter of courtesy, informed the officials of Oblate College of the amount of profit he was making out of his operation, Defendant then

decided that Plaintiff was making too much money. (Tr. 82, April 21, 1970, Vol. II) There was another important reason which should not be overlooked and that is the fact that on at least two occasions Defendant's bank balance was precariously low. The record shows that Defendant's bank balance on August 11, 1967, was only \$671.53 (App. 17); on the 13th of September, 1967, Defendant's bank balance was only \$731.45 (App. 18). It is further submitted that by reason of Plaintiff's voluntarily submitting a statement at the end of the first five weeks (App. 58, 59, and 60), Defendant thereafter simply refused and failed to make payments at the rate of \$1,295 per week. The record also shows that Defendant contended that it made such irregular payments, sometimes in greater amounts and sometimes in lesser amounts because there was "an accounting of sorts" (App. 29-34). There was, of course, no accounting and Defendant simply kept constant financial pressure upon Plaintiff (App. 34, 35, 36, 52, 54, and 58), and continuously promised that Plaintiff would get the money that was owed to him. Notwithstanding Defendant's contention that monthly statements were required, it nevertheless continued to make payments to Plaintiff in varying amounts at irregular intervals for nearly eight months of the one year term; by so doing, Defendant, as a matter of law, waived the alleged requirement of monthly statements. By virtue of Plaintiff's accommodation in submitting the statement at the end of the first five weeks, (App. 58, 59,

and 60), Defendant saw an opportunity to claim that Plaintiff was required, under his agreement, to submit monthly statements to the Defendant. Inasmuch as Defendant acquiesced in and had full knowledge of the fact that Plaintiff purchased all of the food and supplies from the various suppliers for which he was solely and legally liable, the debts thus incurred by Plaintiff were his debts and not those of Defendant. Although the Defendant had no legal right to inquire into Plaintiff's financial obligations to his various food suppliers, the Defendant, nevertheless, and because it held the purse strings, eventually coerced Plaintiff into submitting monthly statements by refusing to make payments to Plaintiff as originally agreed upon. In desperation, Plaintiff then engaged the services of Thomas J. Stemmy Associates, Public Accountants, sometime during the early part of December, 1967, for the purpose of preparing the so-called monthly statements. Shortly after this, the relationship between Plaintiff and Defendant gradually deteriorated until finally, on or about January 15, 1968, Defendant informed Plaintiff that it no longer needed his services. (App. 57)

When reference is made to the records maintained by the Defendant, it is found that Plaintiff was not identified as an employee (P.'s Exh. 30, line 21, App. 78; P.'s Exh. 31, line 5, App. 80). It is interesting to note that, as to Annie Brown, Defendant identified her as an employee in its records. (P.'s Exh. 30, lines 9, 17, and 26,

App. 78)

Not only is the testimony of Defendant's witnesses inconsistent with documentary evidence, but it contains many contradictions relating to crucial issues involving mixed questions of law and fact. As was true in United States v. United States Gypsum Co., 68 S. Ct. 525; 333 U. S., 364 (1948), the oral testimony in this proceeding is in conflict with contemporaneous documents. Therefore, and pursuant to the principles of law enunciated by the Supreme Court in United States v. United States Gypsum Co., supra, such oral testimony should be given little weight, and, in Plaintiff's view, this Court should accordingly rule that the Finding of the Court below that there was no agreement to pay the Plaintiff \$1,295 per week is clearly erroneous.

CONCLUSION

The documentary evidence introduced in evidence in the Court below establishes that:

(1) Plaintiff conducted a business on his own account trading as "James F. McConville Food Services and Consultant" with offices located in the facility owned by Defendant at 391 Michigan Avenue, N. E., Washington, D. C.

(2) At a meeting held on or about February 20, 1967, Plaintiff submitted to the officials of Oblate College a sample budget which he had prepared containing estimates for the cost of food, salaries, linens

and repairs; and at this same meeting Plaintiff submitted a sample menu which he had likewise prepared.

(3) For the first five consecutive weeks commencing with the 27th day of February, 1967, Defendant paid to Plaintiff the sum of \$1,295 per week, which sum corresponds exactly with that set forth in the sample budget prepared by Plaintiff and submitted by him to Defendant at the meeting held with officials of Oblate College on or about February 20, 1967.

(4) Plaintiff applied for and received a District of Columbia Business Tax Registration Number.

(5) The District of Columbia Government issued to Plaintiff an Unincorporated Business Franchise License.

(6) The United States Department of Labor, Bureau of Employees' Compensation issued a Certificate to Plaintiff certifying that he had complied with the provisions of the District of Columbia Workmen's Compensation Act.

(7) Plaintiff purchased all of the food and supplies from various merchants on his own account and such food suppliers looked to Plaintiff for payment as an independent contractor and not as an employee of Defendant. (Plaintiff has been sued on at least two occasions by food suppliers; one suit was filed in the District of Columbia Court of General Sessions by National Hotel Supply Company; and another suit was filed

against Plaintiff by Embassy Dairy in Prince Georges County, Maryland)

(8) Plaintiff was not identified as an employee in Defendant's books and records.

(9) The Defendant's books and records did not reflect withholding of income taxes or Social Security from sums allegedly paid to Plaintiff as an employee.

(10) Defendant's records on at least two occasions revealed that its bank balances were precariously low.

Oral testimony introduced in evidence in the Court below established that:

(1) For approximately three years prior to Plaintiff's agreement with the Defendant he had been employed as Manager in the cafeteria of the Shrine of the Immaculate Conception located immediately across the street from Oblate College at a salary of \$135 per week for a six-day week. Plaintiff's experience in the food industry approximated twenty years.

(2) Father Richard Murphy, President of Oblate College, approached Plaintiff suggesting the possibility that Plaintiff could undertake to serve food to the students and other residents of Oblate College and that Plaintiff understood that such arrangement would be an opportunity for him to engage in business on his own account.

(3) Pursuant to the request of Father Richard Murphy, Plaintiff prepared a sample budget which he submitted at a meeting scheduled and attended by the President, Father Superior, Bursar, and one other principal official of Oblate College.

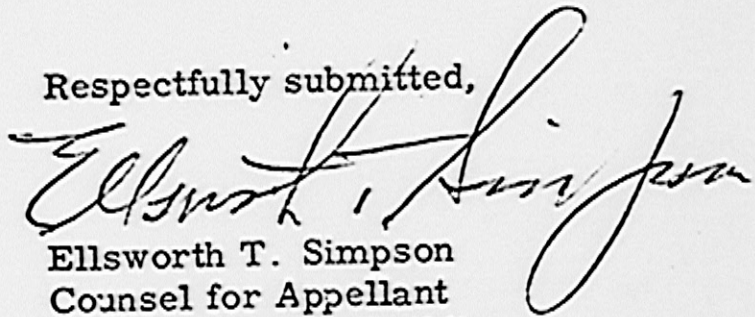
(4) The statement prepared by Plaintiff at the end of the first five weeks of operation was a voluntary act on Plaintiff's part and was done as a mere accommodation because of Defendant's interest in Plaintiff's new venture.

(5) Plaintiff hired and paid four employees in the operation of his business; Plaintiff paid his chef \$120 per week; Plaintiff withheld on his employees' wages and paid Social Security benefits in their behalf.

The evidence introduced in the trial below irrefutably demonstrates that Defendant did not pay to Plaintiff a specified sum of money on a regular or periodic basis and that it did not withhold on his salary or make any deductions for Social Security, and that it did not make any payments in compliance with the District of Columbia Workmen's Compensation Act. Based on the foregoing, James F. McConville respectfully requests that the judgment of the United States District Court for the District of Columbia be reversed and that the case be remanded for entry of judgment for Plaintiff against the Defendant in the amount of \$18,457.49, or, in the alternative, if the Court should find that the contract between the Plaintiff and Defendant was that of independent

contractors terminable at the will of the parties, then judgment for Plaintiff against the Defendant in the amount of \$16,357.49, or, in the further alternative, if this Court should find that Plaintiff was an employee at the will of the Defendant, then judgment for Plaintiff against the Defendant in the sum of \$3,706.08 with interest thereon, with costs here and in the Court below to Plaintiff.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Ellsworth T. Simpson".

Ellsworth T. Simpson
Counsel for Appellant
Suite 500 Bowen Building
815 - Fifteenth Street, N. W.
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ADDENDUM

Statutes Involved

CHAPTER 21 - FEDERAL INSURANCE CONTRIBUTIONS ACT,

INTERNAL REVENUE CODE OF 1954

Sec. 3101. Rate of Tax

In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages [as defined in Section 3121 (a)] received by him with respect to employment [as defined in Section 3121 (b)] --

(3) with respect to wages received during the calendar years 1965 to 1969, both inclusive, the rate shall be 3 percent;

Sec. 3102. Deduction of tax from wages.

(a) Requirement -- The tax imposed by Section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

INTERNAL REVENUE CODE OF 1954

Chapter 24 - Collection of Income Tax at Source on Wages

Sec. 3402. Income Tax Collected at Source.

(a) Requirement of Withholding -- Every employer making payment of wages shall deduct and withhold upon such wages a tax equal to 18 percent of the amount by which the wages exceed the

number of withholding exemptions claimed, multiplied by the amount of one such exemption as shown in subsection (b) (1).

Sec. 3403. Liability for Tax

The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment.

ITEMIZATION OF PAYMENTS MADE DIRECTLY TO
JAMES F. McCONVILLE BY OBLATE COLLEGE
FOR THE PERIOD
FEBRUARY 27, 1967 TO JANUARY 15, 1968, INCLUSIVE

<u>Due Date of Payment</u>	<u>Amount due</u>	<u>Amount paid</u>	<u>Date paid</u>
2/27/67	\$1,295.00	\$1,295.00	2/27/67
3/6/67	"	1,295.00	3/6/67
3/13/67	"	1,295.00	3/13/67
3/20/67	"	1,295.00	3/20/67
3/27/67	"	1,295.00	3/27/67
4/3/67	"	None	----
4/10/67	"	1,200.00	4/10/67
4/17/67	"	1,200.00	4/18/67
4/24/67	"	1,200.00	4/26/67
5/1/67	"	1,200.00	5/4/67
5/8/67	"	1,200.00	5/10/67
5/15/67	"	1,200.00	5/17/67
5/22/67	"	1,200.00	5/22/67
5/29/67	"	1,200.00	5/31/67
6/5/67	"	1,000.00	6/7/67
6/12/67	"	None	----
6/19/67	"	None	----
6/26/67	"	1,500.00	6/26/67

4 a

<u>Due Date of Pa . nent</u>	<u>Amount due</u>	<u>Amount paid</u>	<u>Date paid</u>
7/3/67	\$1,295.00	None	----
7/10/67	"	None	----
7/17/67	"	1,500.00	7/15/67
7/24/67	"	None	----
7/31/67	"	None	----
8/7/67	"	2,000.00	8/8/67
8/14/67	"	1,500.00	8/16/67
8/21/67	"	None	----
8/28/67	"	None	----
9/4/67	"	None	----
9/11/67	"	1,000.00	9/12/67
9/18/67	"	1,200.00	9/18/67
9/25/67	"	1,200.00	9/27/67
10/2/67	"	1,200.00	10/2/67
10/9/67	"	None	----
10/16/67	"	2,400.00	10/17/67
10/23/67	"	None	----
10/30/67	"	None	----
11/6/67	"	None	----
11/13/67	"	None	----

5 a

<u>Due Date of Payment</u>	<u>Amount due</u>	<u>Amount paid</u>	<u>Date paid</u>
11/20/67	\$1,295.00	None	----
11/27/67	"	None	----
12/4/67	"	None	----
12/11/67	"	None	----
12/18/67	"	1,740.49	12/21/67
12/25/67	"	2,015.61	12/26/67
1/1/68	"	None	----
1/8/68	"	2,270.18	1/11/68
1/15/68	"	1,246.55	1/18/68

BRIEF FOR APPELLEE

IN THE
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 24,601

JAMES F. McCONVILLE,

Appellant,

v.

OBLATE COLLEGE,

Appellee.

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 26 1971

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IN THE
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 24,601

JAMES F. McCONVILLE,

Appellant,

v.

OBLATE COLLEGE,

Appellee.

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF ISSUES

Did the findings of fact by the Court below exceed the permissible parameters of the clearly erroneous doctrine notwithstanding the opportunity of the Court to give due weight to the factor of credibility.

COUNTERSTATEMENT OF THE CASE

Appellee, Oblate College [hereinafter referred to as the College], is organized and incorporated as a nonprofit educational institution under the laws of the District of Columbia.

The College is affiliated with the missionary order of the Oblates of Mary Immaculate. Traditionally, the College population during any typical academic year (mid-September-May) consists of approximately forty students and twenty-five resident clergy. (App. 17)*

Prior to February 27, 1967, the necessary food services for the resident population of the College were secured from an independent catering organization which prepared the required meals off premises and thereafter transported the food to the College dining area. (App. 15, 16, 54)

For a substantial period prior to February of 1967 the College had become increasingly dissatisfied with the catering arrangement because of both the quality and the cost of the food

* Reference in this brief to materials appearing in Appellee's Appendix will be identified by the abbreviation App. followed by the specific page therein where the reference commences. Reference to testimony not reproduced in the Appendix will be identified by reference to the volume of the Reporter's Official Transcript and the specific page therein.

served. In addition to this basic dissatisfaction, the College had recently completed a major renovation of the kitchen facilities at the College. This renovation of the kitchen served to reinforce the College's desire to seek an alternative, and less costly, means of providing the required food services through the utilization of their own facilities. (App. 16,54,55)

In addition to the other functions and responsibilities of the religious community located at the College, the resident clergy were also responsible for the religious services conducted at the Shrine of the Immaculate Conception which is located directly adjacent to the College proper. As a result of his frequent visits to the Shrine, Father Richard Murphy, President of the College, had met and talked on many occasions with the Plaintiff, Mr. McConville, who at that time was employed as the assistant manager of the Shrine Cafeteria. (App. 68)

On the occasion of one of his visits to the Shrine in early 1967, Father Murphy queried Mr. McConville as to whether he might be interested in discussing the College food situation with a view of assuming the management of the College's kitchen and dining facilities. Mr. McConville indicated in the affirmative. (App. 68, 69)

As a result of Mr. McConville's indication of interest Father Murphy requested that he attend a meeting at the College

to discuss the situation with other members of the religious community. Present at this meeting were Father Murphy, Father Martin Walsh (Superior of the Washington Oblate Community), Father John Walsh (Bursar or Treasurer of the Washington community) and Father Richard Hanley. (App. 16,55,68)

The respective responsibilities of each of the meeting participants can briefly be described as follows: Father Murphy, as President of the College, was responsible for all matters pertaining to the academic training of the college student body and, in addition held the position first assistant to the Superior; Father Martin Walsh, as Superior of the Washington community of the Oblates of Mary Immaculate, was responsible for the temporal and spiritual wellbeing of both the resident clergy and College Seminarians; Father John Walsh (no relation to Father Martin Walsh), as Bursar, was responsible, under the direct supervision of the Superior, for the financial affairs of the community. (App. 14,53,68)

The ultimate responsibility for the hiring of Mr. McConville or any other individual rested with Father Martin Walsh as Superior of the Community. (App. 19,60)

The purpose of calling this meeting was twofold: to explain to Mr. McConville what the College would expect in terms of service from the individual eventually hired to manage

and operate the College kitchens facilities; secondly, to provide Father Martin Walsh the occasion of meeting Mr. McConville for purposes of evaluating his qualifications and determining whether Mr. McConville was the type of individual who would appropriately fit into the environment of a religious community. (App. 53,69)

During this meeting Father Martin Walsh explained to Mr. McConville the College's problems and resultant dissatisfaction with the catering organization. He also delineated those responsibilities and duties which the College expected to be assumed by the individual eventually hired to fill the position.

Briefly the requirements included the serving of all meals to the College population; the ordering of the necessary stocks; the hiring and management of the kitchen personnel; the preparation of daily menus for the prior approval of the College Bursar. (App. 56,57)

No offer or proposal was made by any representative of the College to Mr. McConville at this meeting. (App. 17,57,58,71) The meeting was terminated with a request directed to Father John Walsh by the Superior that Mr. McConville be shown the College kitchen and dining areas and that further particulars concerning the proposed position be taken up between Mr. McConville and Father John Walsh. (App. 17,58,59,71)

After the meeting Mr. McConville was shown the College facilities by Father John Walsh. During the tour Father Walsh explained to Mr. McConville that the population of the College does not remain static throughout the year and, specifically, that during the summer months (mid-June-mid-September) the normal College complement of 65 to 70 would drop to low of 12 during the month of August. (App. 17,18)

During the discussions following this tour, Mr. McConville stated to Father John Walsh that, if offered the position, he would work for the same compensation he was receiving at the Shrine Cafeteria - \$135 per week. (App. 18,19)

Shortly thereafter, Father John Walsh met with the Superior and recommended Mr. McConville for the position. Pursuant to this recommendation Father Martin Walsh, the Superior, authorized Father John Walsh to hire Mr. McConville at \$135 per week. (App. 18,19,59,60) Pursuant to this authorization Father John Walsh hired Mr. McConville at the expressed compensation of \$135 per week. (App.20)

In view of the fact that Mr. McConville was to assume full responsibility for operating the College kitchen, the Superior, to facilitate this operation, authorized Father John Walsh to advance monies to Mr. McConville to cover the ongoing materials and labor costs of the kitchen operation. This

authorization was premised solely upon the understanding that Mr. McConville would submit statements of account of a monthly basis. (App. 20,21,60)

Thereafter Father John Walsh informed Mr. McConville that the College would advance monies to cover both the required out of pocket expenses and Mr. McConville's salary. These monies, however, were to be accounted for by Mr. McConville by the monthly submission of a verified expense statement. (App. 20,21)

In this respect, the College's prior cost experience with the catering organization was discussed by Father John Walsh with Mr. McConville and shortly thereafter Mr. McConville presented Father John Walsh with a "sample budget" (Plaintiff's Exhibit 1 - App. 72) which estimated the cost of the operation for one week at \$1295. (App.20)

On February 27, 1967 Mr. McConville assumed the management of the kitchen and dining facilities. Pursuant to the College's agreement to advance expense money five checks, each in the amount of \$1295, the amount appearing on the "sample budget", were issued at weekly intervals to Mr. McConville. (Plaintiff's Exhibit 32 - App. 79)

During the early part of April Mr. McConville submitted Father John Walsh an expense statement (Defendant's Exhibit 1 -

App. 77) which delineated the cost of the food service for the five week period ending March 31, 1967. (App. 22,23)

The statement included individual items identifying the cost of food, payroll, laundry, miscellaneous supplies and Mr. McConville's salary. For this five week period, after deduction of the noted expenses, the statement showed a credit balance in favor of the College in the amount of \$630.26. (App. 77)

The statement, however, showed Mr. McConville deducting an aggregate salary of \$750 or \$150 per week which was \$15 per week in excess of the agreed compensation. When confronted with this variance by Father John Walsh, Mr. McConville stated that he felt in view of the requirements of the position, he was entitled to more than the \$135 per week agreed upon. Mr. McConville, however, agreed to revert to the agreed figure. (App. 22-24)

From the date of this first statement through mid December 1967 no further statements were submitted by Mr. McConville despite repeated requests by both Father John Walsh and the Superior. These demands elicited continued assurances from Mr. McConville that the statements were in the process of preparation and would be available shortly. (App. 24,25, 62,64)

Since it was apparent that obligations were being incurred for both supplies and labor during this period the College continued to advance Mr. McConville money at periodic intervals despite his failure to provide the required operating statements. (App. 25) The amount of these advancements, which varied, was predicated solely upon Father John Walsh's judgment, based upon past experience, that the individual advances would be sufficient in amount to cover the costs which apparently were being incurred by Mr. McConville in operating the dining facilities. Absent the required statements there was no way the College could respond to the actual expenses of the operation. (App. 25)

Mr. McConville's stewardship of the College's dining operation continued in a more or less unsatisfactory fashion until the latter part of September. At that time Mr. McConville, without prior notice to any official of the College, absented himself for a period of five weeks. (App. 64) During the period of his absence Father Martin Walsh assumed the day to day management of the operation, including the payment of wages to kitchen personnel and the direct payment of trade accounts for supplies secured during Mr. McConville's absence.

Upon Mr. McConville's return in early December officials of the college again demanded the submission of the overdue monthly expense statements. (App. 64,65) These statements,

covering the months of April through September were finally tendered to College officials by Mr. McConville on or about December 5. (Plaintiff's Exhibit 32 - App. 78-85)

Each of the statements, in addition to carrying a running balance showing either net overpayment or underpayment by the College, carries an expense item captioned "Mr. McConville's Fee" in the amount of \$540 (4 weeks at \$135).

The College allowed Mr. McConville to resume his management of the dining operation. However, in the latter of December in view of Mr. McConville's unpredictable attendance, his failure to appropriately execute his duties while in attendance and the increasing evidence of his lack of payment of many College food supplies, a decision was reached to terminate his services. (App. 27)

During the last week in December the Superior, in the presence of Father John Walsh, informed Mr. McConville that his services would no longer be required after January 15, 1968. At this time Mr. McConville was requested to put his accounts in order and to submit a final statement to College officials prior to his departure. (App. 27,64)

Pursuant to this request, Mr. McConville submitted two additional monthly operating statements prior to his departure (Plaintiff exhibit 32 - App. 86,87): the first contained a

listing of the amounts due trade accounts for supplies provided during the month of November (no claims were made for either Mr. McConville's salary or employee wages which had been paid directly by the College during the period of his absence); the second statement dated January 9, characterized by Mr. McConville as the "final" statement, contained a request for salary payments for both December and January - each in the amount of \$540.

With the exception of \$270 of the salary and an unsupported \$750 claim for "cash, food supplies, miscellaneous payroll" allegedly incurred during the period of March through December all claimed expenses were satisfied through either payment to Mr. McConville or directly to the trade account involved. (App. 13,66)

ARGUMENT

The Court below sitting as the trier of fact was presented with two irreconcilable versions of the events leading to, and the terms of, Appellant's employment at the College as manager of the kitchen and dining facilities.

Pursuant to Rule 52 of the Federal Rules of Civil Procedure the trial Court entered detailed findings of fact concerning the relationship existing between the Appellant

and the Appellee and concluded, as a matter of law, that the Appellant had failed to establish by a preponderance of the evidence that there had been a breach of contract and that the Appellee was indebted to him. The Court's findings of fact and conclusion of law are set forth in Appellee's Appendix to this brief. (App. 1)

The Appellant, Mr. McConville, and a Mr. James Spencer, the kitchen chef at the time of Mr. McConville's tenure, were called as witnesses on behalf of the plaintiff. Father John Walsh, the Bursar of the Oblate Community, was called to testify as an adverse witness by counsel for the Plaintiff. Father Martin Walsh, the Superior of the Oblate Community, Father Richard Murphy, the President of the Oblate College, Mr. Alfred McGarraghy, the operator of the Shrine Cafeteria, and Mrs. Annie Brown, an employee of the Oblate Community, testified on behalf of the Defendant below.

It is a well settled principle of appellate review in our Federal Court System that findings of fact by a trial Court sitting without a jury shall not be set aside unless "clearly erroneous", and, that due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses.

As to the latter requirement reference should be made to the express testimonial evaluation of the trial judge which crystalizes the polarization of evidence and the weight that the factor of credibility played in the ultimate findings and conclusion of the Court.

Specifically, at the conclusion of the Plaintiff's case the Court was confronted with two dramatically opposed and irreconcilable versions of the plaintiff's case: The first, provided by the testimony of the plaintiff himself; the second, provided by the testimony of Father John Walsh, Bursar of the Oblate Community, who was called as an adverse witness by counsel for the Plaintiff.

Upon motion at that time by counsel for the Defendant for a dismissal of the plaintiff's action, the Court after hearing argument noted that in view of the testimonial conflict between the Plaintiff and Father John Walsh the case was "going to turn on the question of credibility." (Vol. III Tr. 61,62)

Appellee submits that an appraisal of the evidence proffered below will clearly demonstrate that the findings of the Court are not "clearly erroneous" but, on the contrary, supported by substantial testimonial and documentary evidence of record.

A brief review of the conflicting evidence will both quantify the countervailing evidence against the plaintiff's alleged theory of the case and the testimony presented in support of that theory and define the significance that the question of credibility played in the trial Court's ultimate decision.

A) Events Leading to Mr. McConville's Meeting With College Officials.

Mr. McConville testified that while employed as the assistant manager of the Shrine Cafeteria he was approached by the President of the Oblate College, Father Richard Murphy, who inquired as to whether he might be interested in operating the College dining facilities.

He further testified that he responded in the affirmative and that Father Murphy then asked him to prepare a sample budget (Plaintiff's Exhibit 1 - App. 72) showing the cost of such an operation. Thereafter he testified that he was requested by Father Murphy to attend a meeting with other officials of the community at which time he was to present his calculations in the form of the sample budget. (App. 31)

Father Richard Murphy was called to testify on behalf of the defendant. In regard to the events leading up to the meeting at the College he testified that he did approach

Mr. McConville in early January of 1967 and, after having explained the College's desire to change from a catering system to an in-house operation, asked if Mr. McConville might care to discuss the matter with officials of the Oblate Community. Mr. McConville replied in the affirmative and Father Murphy requested him to meet with other officials at the College proper. (App. 68)

However, Father Murphy testified without qualification that he did not, on any occasion, request Mr. McConville to prepare a sample budget or any other materials for that matter. (App. 69,70)

Appellant would also note at this point that a third theory concerning the hiring of Mr. McConville by the College now appears in Appellants Brief for the first time.

Specifically at page 7 of the Brief for the Appellant the following description appears relating to Father Murphy's original approach to Mr. McConville and the action Mr. McConville undertook pursuant to this encounter.

"Father Richard Murphy, President of Oblate College, represented to Plaintiff that this would be an excellent opportunity for him to go into business for himself This prospect appealed to the Plaintiff and after considering the offer he notified his employer that he intended to resign and thereupon gave two weeks notice...."

"On or about the 20th day of February, 1967, and by prearrangement, Plaintiff met with various officials of the Oblate College for purposes of discussing the terms and conditions upon which Plaintiff was to provide all the services in preparing their meals each day...."

This characterization of the evidence would appear to imply that Father Murphy offered Mr. McConville the position at the time of the initial discussion; that Mr. McConville accepted the offer at that time, and finally that the meeting with the other College officials was held solely for the purpose of filling in the details of the agreement previously reached between Father Murphy and Mr. McConville.

There is no testimony of record, including that of the Plaintiff, to support this alternative theory of the case. On the contrary, the Plaintiff's own testimony stresses the contention that the contract between himself and Father Martin Walsh at the joint meeting held at the college proper during the latter part of January 1967. (App. 31, 38)

B) The Meeting

Mr. McConville testified that at the request of Father Murphy he attended a meeting at the College at some point in late January or early February for purposes of discussing the College's proposed embarkation into the area of

on-house food services. He further testified that in addition to Father Murphy, Fathers Martin Walsh, John Walsh, Hanley and McGuire were present. (App. 31,33)

On direct examination concerning the import of this meeting, Mr. McConville testified that he presented the sample budget, prepared at the request of Father Murphy, and, in addition, a sample menu outlining daily meals for a seven day period. (App. 31)

It should be emphasized that the "sample budget" allegedly presented to this meeting represents the "written contract" upon which the claim before the Court is premised. (App. 31,38,39)

Upon cross examination, Mr. McConville testified that the "contract" was reviewed and commented upon by each of the representatives of the College; that one or more of the priests present characterized the "sample budget" as "being fair" and being somewhat below the cost of the catering operation. (App. 33-35) Upon further interrogation concerning the Plaintiff's claim that the "contract" was to extend for a period of one year Mr. McConville testified that after reviewing the "contract" (sample budget) the Superior, Father Martin Walsh, said "Mr. McConville, we find this budget fair, the kitchen is yours, you've got it for a year." (App. 38,39)

In contrast to the above testimony, Fathers Martin Walsh, John Walsh and Murphy, three of the five representatives claimed by Mr. McConville to be present at the meeting, also testified concerning the purpose of the meeting.

They testified the reason for holding the meeting was twofold: First, to provide an opportunity for the other officials of the Community to meet Mr. McConville; secondly, to appraise Mr. McConville of what the College would expect from the individual eventually hired to fill this position. (App. 53,54,71)

Without qualification each of these three witnesses testified: that Mr. McConville did not present either a "contract" (sample budget), a sample menu or any other documentation to any participant of that meeting; that Mr. McConville was not offered a position of any nature by any one present at the meeting; finally, that the meeting was terminated by the Superior with a request to Father John Walsh to take Mr. McConville through the College kitchen and dining facilities and to discuss further the specifics of the College's proposed undertaking. (App. 17, 57-59, 69-71)

It should also be noted that both Father John Walsh and Father Murphy testified that the first time they saw the

sample budget was at the commencement of this litigation.

(App. 56,57,69)

There is neither ambiguity nor lack of recollection in either version of the testimony concerning the events that transpired at this meeting. Mr. McConville's recollection is crystal clear not only as to the physical presentation of the documents to each of the meeting participants, but, moreover, to the comments of each of the officials of the College concerning the alleged documents.

The findings of the Court below clearly indicate what version of the facts it chose to accept. Specifically, that the "sample budget" was presented to the Bursar of the College by Mr. McConville subsequent to his hiring. (App. 5)

C) The Documentary Evidence Before the Court Below.

Appellant would ask this Court "to give little weight" to the oral testimony of the representatives of the College because the testimony "is a conflict with contemptuous documents." (Brief for Appellant 30)

Appellee would, however, respectfully suggest that an objective evaluation of the documentary evidence in conjunction with the testimony of the representatives of the College will show not only that there exists no conflict but,

on the contrary, that the documentary evidence forcefully corroborates the testimony presented on behalf of the College.

1) The Sample Budget

To sustain the claim of the Plaintiff the Court below would, of necessity, have been required to find that the sample budget, alleged to have been tendered to, and approved by, officials of the College, set forth the contractual terms of the relationship between Mr. McConville and the College.

For the Court's convenience the sample budget, which has been characterized by Mr. McConville as the "unsigned contract", is set forth below.

SAMPLE BUDGET

SERVING SIXTY-FIVE TO SEVENTY BREAKFAST, DINNER AND SUPPER

ONE WEEK OPERATION

COST OF FOOD EST.	900.00
COST OF PAYROLL 4 EMPL.	370.00
SUPPLIES LINEN, SOAP, ETC.	20.00
REPAIRS	5.00
	1,295.00

(PLAINTIFF'S EXHIBIT 1 - App. 72)

According to the Plaintiff's theory of the case the acceptance and approval of the above document committed the College to a total payment to Mr. McConville of \$63,740.00 over a period of one year.

In view of the fact that the aggregate amount of the sample budget is predicated upon the serving of 65-70 persons three meals per day for a period of seven days, consideration should be given to the testimony of the Plaintiff and the Defendant concerning both the varying population of the College and the undefinable food services required for special functions during the course of any given year.

Specifically, the testimony clearly establishes that the resident population of the College drops from a normal complement of 65 during the academic year (mid-September-May) to a low of 12 during the summer months (June-mid-September). (App. 18,63) An additional variable in the population equation is provided by the fact, as acknowledged by Mr. McConville himself, that special functions were held at the College proper throughout the year requiring additional food services to persons attending these functions. (App. 34,35)

The occasion of such functions would include the annual twenty-fifth and fiftieth jubilee dinners, ordination, graduation, Saint Patricks Day, and the Feast of the Immaculate

Conception. In some cases the potential attendance at these functions would approximate 250 persons. (App. 35, 37; Vol. 1 Tr. 115)

According to the testimony of Mr. McConville it was understood that he would provide, out of his weekly payment of \$1295.00, the necessary food and services for any special event including these noted above. Mr. McConville rationalized that the additional expense incurred in serving these special events would be offset by the drop in College population during the summer months. (App. 35)

To place this rationalization in appropriate context it should also be noted that the first awareness that Mr. McConville had concerning the varying population during the summer months and the special events at the College came after he claims to have presented the "contract" (sample budget) to the College officials. (App. 33-37)

It strains reason to believe that an individual who claimed twenty years of experience in the food service industry, would commit himself to a fixed arrangement when the quantity of food to be served and services to be provided were completely open-ended and mathematically undefinable.

Conversely, it also strains reason to believe that Father Martin Walsh would commit in excess of \$60,000 of the

College funds for an undefined quantity of services when at the present time with the catering operation the College was only being charged for the specific number of meals served on any given day.

It should also be noted that the express authority of Father Martin Walsh, as Superior, to enter into contracts was limited to \$500. The contractual commitment of College funds exceeding \$500 required written authorization from Provincial authorities in Boston. (App. 60)

2. The Five College Checks In The Amount of \$1295

Appellant would ask this Court to construct the issuance of the five checks, each in the amount of \$1295, during the first five weeks of Mr. McConville's tenure at the College as strong corroboration of the existence of the alleged contract.

However, the testimony of record establishing that each of the five checks were issued pursuant to any arrangement reached between Father John Walsh and Mr. McConville, after Mr. McConville's hiring, whereby the College would undertake to advance monies to satisfy the day to day expense of the operation. These advancements were made under the express understanding that Mr. McConville would account for the application of the funds through the monthly submission of

verified expense statements. (App. 21,60,66) The amount of money advanced during this first five week period was based upon the estimation evidenced in the sample budget which was made up by Mr. McConville, which in turn, was based upon costing information supplied by Father John Walsh.

Appellant also calls this Court's attention to the fact that the "contract" (sample budget) appears to make no provision for the salary of Mr. McConville at the rate of \$135 per week. Suffice to say, that the operating statement submitted by Mr. McConville for the first five weeks of his management (Defendant's Exhibit 1 - App. 77) showed not only that in addition to paying the listed expenses including payroll he had drawn a salary of \$150 per week and still had a \$630 balance remaining from the monies advanced by the College.

3. The Monthly Operating Statements

A total of nine expense statements were submitted to the College by Mr. McConville during the period February 27, 1967 to January 9, 1968.

With the exception of the first statement submitted covering the five week period ending March 31, 1967, and the final statement which was dated January 9, 1968, each of the expense analysis statements delineated Mr. McConville's operating expenses including his own salary, for a one month

period. These documents are set forth in Appellee's Appendix 77-87.

The first statement prepared and submitted by Mr. McConville in early April of 1967 defines the expenses incurred during the first five weeks of his stewardship ending March 31, 1967. For the convenience of the Court the document is set forth below.

FIVE WEEK OPERATION FEB. 26, 1967 to MARCH 31, 1967

COST OF FOOD	3,558.08
COST OF PAYROLL	1,347.00
JAMES McCONVILLE	750.00
LAUNDRY	83.75
SUPPLIES	105.91
TOTAL	5,844.74
AMOUNT RECEIVED	6,475.00
BALANCE	630.26

(DEFENDANT'S EXHIBIT 1-APP. 77)

Mr. McConville testified that his statements were "gratuitously" prepared and submitted to college officials simply to indicate the degree of "success" he was having with this operation. (Vol. III, Tr. 31-33)

Upon cross examination he testified that the line item designated "JAMES McCONVILLE" in the amount of \$750 represented his "draw" during the period from the monies supplied by the College; further, that the "Balance" of

\$630.26 represented additional "profit" which he determined not to "draw" from the monies available. (App. 40)

It should also be recalled at this juncture that Father John Walsh had previously testified that upon receipt of this statement he confronted Mr. McConville and demanded an explanation as to why he was paying himself a salary of \$150 per week when he had been hired at the rate of \$135 per week. Mr. McConville responded that although he thought he should receive more he would revert to the amount of the original agreement. (App. 22-24)

During the month of December Mr. McConville submitted statements prepared by his accountant which set forth on a month by month basis the expenses of the operation and the monies received from the College. These statements covered the period February 26, 1967 through October 1967. (Plaintiff's Exhibit 32 - App. 78-85)

As to the rationalization behind the submission of these statements Mr. McConville testified that it was apparent at that time that the College did not intend to honor its original contractual agreement and in a desperate effort to secure some money he acquiesced in the College's demand that monthly operating statements be submitted.

Appellant submits that the record before the Court below is completely barren of any evidence supporting the alleged existence of a covert conspiracy on the part of the College to deny Mr. McConville his money.

Each of the statements submitted by Mr. McConville carries an expense item labeled "Mr. McConville's Fee" in the amount of \$540 (\$135 times 4 weeks) with the exception of the first statement where the amount is \$750 (\$150 times 5 weeks). (App. 78-85)

Each of the statements also sets forth a reconciliation section wherein the total of Mr. McConville's expenses and his "fee" for the period is balanced against the total amount of money paid by the College during the same period. This calculation results in either an underpayment described as a "short" or an overpayment by the College. The resultant debit or credit, as the case may be, is then carried over to the following month's statement as a debit or credit against the following months "shortage" or "overage".

In this respect, it should be recalled that Mr. McConville testified on cross examination that the "balance" item appearing on the statement he personally prepared covering the first five weeks of the operation represented "additional profit" which he had determined not to draw immediately from the account. (App. 40)

In light of this testimony, on cross examination he was asked for an explanation of how he could "draw" \$540 a month from the operation when the additional statements he submitted (Plaintiff's Exhibit 32 - App. 78-85) indicated a loss or negative "profit".

After considerable prodding on this point without a responsive answer Mr. McConville finally testified that he had not looked at the statements prior to submitting them to the College. (App. 40-42)

Not only do these statements clearly evidence what Mr. McConville's understanding of the actual agreement was between himself and the College but, moreover, his testimony to the affect that he did not look at the financial statements prepared at his request for the purpose of defining the amount of money due him by the College, strains reason.

Finally, two additional statements were submitted by Mr. McConville covering the period November 1 through January 1. These statements were personally prepared by Mr. McConville. It is significant that the statement covering the month of November (the month that Mr. McConville was physically absent from the College) contains no claim for "Mr. McConville's Fee."

The last statement submitted by Mr. McConville bearing the date of January 9 includes two items styled "Mr. McConville"

for the months of December and January, each if the amount of \$540 (\$135 times 4 weeks).

This statement was characterized by Mr. McConville as the "final" statement to the College. He also testified upon cross examination that on no occasion before or after his termination by the College, did he present to Father Martin Walsh or any other College official a statement requesting the amount of money he now claims due under his theory of the case. (App. 44,45,47,52)

Appellant submits the operating statements, both singularly and collectively, strongly corroborate the testimony of the College officials concerning the working arrangement with Mr. McConville.

4. Subsequent Employment Application of the Applicant.

Shortly after the termination of his services by the College, Mr. McConville applied for a position at the Cleaves Food Services Corporation of Silver Spring, Maryland.

Pursuant to that company's policy Mr. McConville was required to execute an application for employment. (Defendant's Exhibit 2 - App. 88,89)

In addition to other information requested on the application there was a section devoted to former employers.

In respect to the Oblate College, Mr. McConville identified his position as an "operator" at a salary of \$135 per week.

This post facto admission by a party strongly militates against the Plaintiff's testimonial assertions concerning his relationship with the College.

D) Independent Contractor or Employee Relationship

Appellant devotes much of his argument to the contention that Mr. McConville was in fact an independent contractor and not an employee of the College.

In this respect the Court found as a matter of fact that the arrangement between the College and Mr. McConville was for an indefinite period and at the will of the parties.

To arrive at this finding the Court, of necessity, was required to reject Mr. McConville's testimony that he had been commissioned by Father Martin Walsh for a period of one year. Conversely, the record is replete with testimony stating that it was expressly understood that Mr. McConville's hiring or employment as manager of the College kitchen was strictly on a trial basis.

Alternatively, Appellant argues that even assuming, arguendo, that the relationship was at the will of the parties, Mr. McConville would still be entitled to the \$1295 per week for the 46 weeks he managed the kitchen.

This alternative thesis, of course, requires the acceptance of the premise that the College had agreed to pay Mr. McConville \$1,295 per week in accordance with the "sample budget". In this respect the Court below found as a matter of fact that the sample budget did not constitute the contract between the parties; further, that under this arrangement between the College and Mr. McConville he was to be compensated at the rate of \$135.00 per week.

Each of these findings of fact are substantially supported by both testimonial and documentary evidence of record.

CONCLUSION

Appellee respectfully submits to this Honorable Court that the findings of fact by the Court below are supported by substantial evidence of record.

It is therefore requested that the judgment entered in these proceedings be affirmed by this Court.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

JAMES F. McCONVILLE,

Appellant

v.

OBLATE COLLEGE,

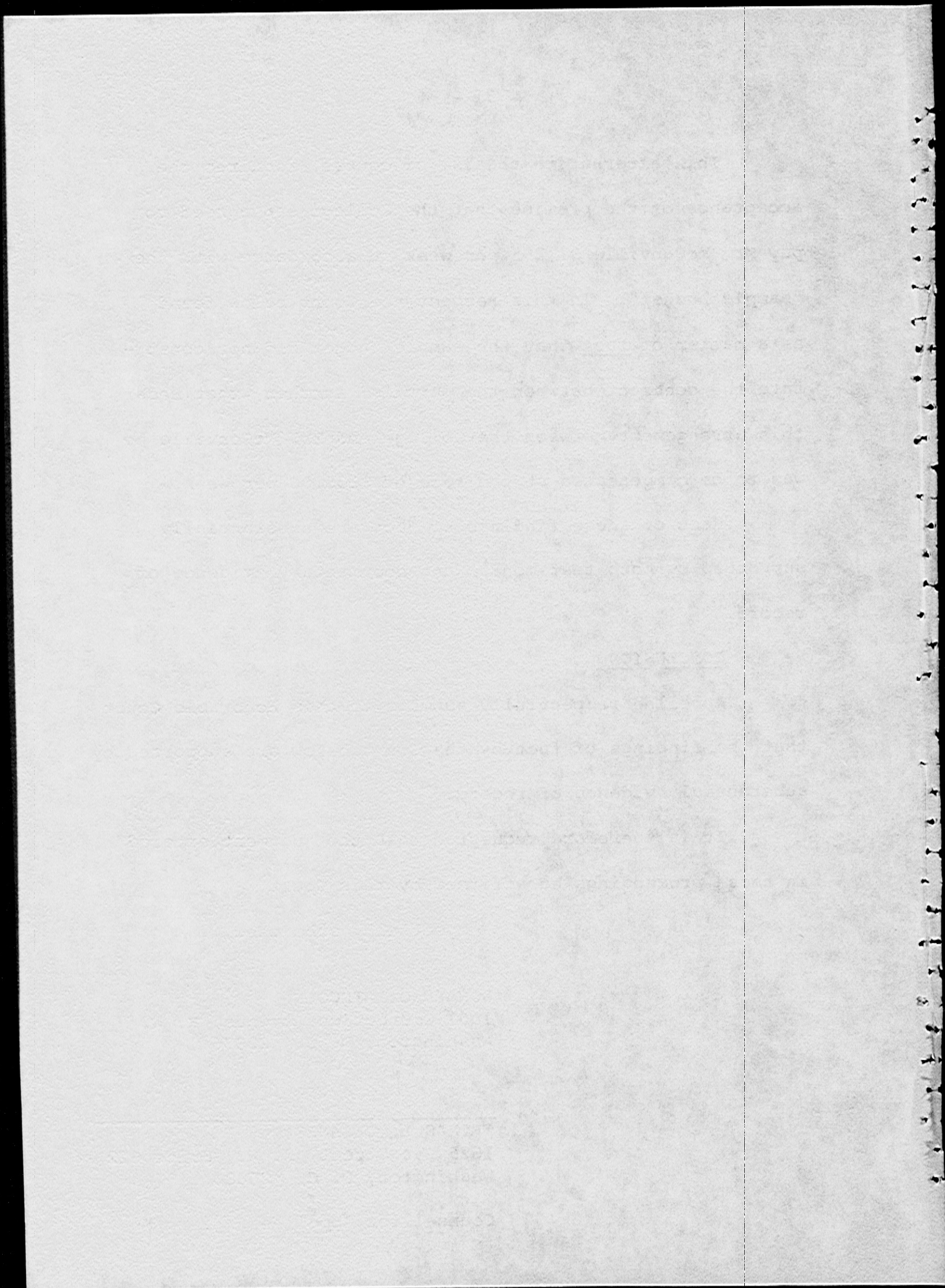
Appellee

CASE NO. 24,601

CERTIFICATE OF SERVICE

I hereby certify that two copies each of the Brief for Appellee and Appellee's Appendix filed herein by Appellee were mailed, postage prepaid, this 26th day of January, 1971, to Ellsworth T. Simpson, Esquire, Attorney for Defendant, 815 Fifteenth Street, N. W., Washington, D. C. 20005.

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REPLY BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 24,601

JAMES F. McCONVILLE, Appellant,

v.

OBLATE COLLEGE, Appellee.

Appeal from the United States District Court for the
District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 23 1971

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the relationship between Plaintiff and Defendant that of independent contractors or that of employer-employee?
2. Is not undisputed documentary evidence establishing the nature of the relationship between the Plaintiff and Defendant entitled to greater weight than oral testimony?
3. In its dealings with Plaintiff, is not the conduct of the Defendant persuasive evidence as to the true nature of the relationship between the parties?
4. Whether the Findings of Fact and Conclusions of Law of the Court below are supported by the evidence in the record.
5. Whether under the evidence before the Court below it erred in finding as a fact and conclusion of law that "... it matters not whether the Plaintiff was an independent contractor or an employee..."
6. Whether based on the evidence before the Court below it erred in finding as a fact that Plaintiff is not entitled to any recovery under the stipulation entered into by the parties.

IN THE
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 24,601

JAMES F. McCONVILLE, Appellant,

v.

OBLATE COLLEGE, Appellee.

Appeal from the United States District Court for the
District of Columbia

REPLY BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

Appellee filed its Brief under date of January 26, 1971.
Appellant was granted an extension of fifteen (15) days or until the
24th day of February, 1971, within which to file a Reply Brief.
Accordingly, this brief is filed on behalf of Appellant.

REPLY TO: "COUNTERSTATEMENT OF THE CASE"

As to that part of Defendant's Counterstatement of the Case relating to and involving its organizational structure, duties and functions of its officials, and its unhappy experiences with a food caterer, no useful purpose will be served in replying thereto. Accordingly, therefore, Plaintiff's Reply will be directed to matters of a more substantive nature and which bear directly upon the issues with which this proceeding is concerned.

To a great extent, Defendant's Counterstatement of the Case is predicated upon the subjective state of mind of certain officials of Oblate College and sets forth their thought processes, views, and intentions in such manner as to convert them into facts. Moreover, in the presentation thereof Defendant has carefully ignored certain essential facts in the form of documentary evidence. In replying to Defendant's Counterstatement, its allegation relating to the purpose for which the meeting was called by Defendant on or about February 20, 1987, is an appropriate starting point. Defendant's contention that, "the purpose of calling this meeting was twofold: to explain to Mr. McConville what the College would expect in terms of service from the individual eventually hired to manage and operate the College

kitchens facilities; secondly, to provide Father Martin Walsh the occasion of meeting Mr. McConville for purposes of evaluating his qualifications and determining whether Mr. McConville was the type of individual who would appropriately fit into the environment of a religious community. (App. 53, 69)" At this juncture, it might be well to mention the fact the references cited by Defendant in support of this contention consists of oral testimony elicited on direct examination of Father Martin Walsh and Father Richard Murphy, all of which is obviously self-serving.

If the first purpose, as claimed by Defendant, has any meaning at all, it must be that Mr. McConville was regarded, by the officials of Oblate College, as only one of several prospective employees that the Defendant might eventually hire to operate its kitchen. It is undisputed that it was Father Murphy who made the initial overture to Mr. McConville insofar as the operation of its kitchen is concerned. Plaintiff did not approach Father Murphy or any other official of Oblate College regarding the operation of its kitchen facilities. Assuming, arguendo, that this was, in fact, one of the reasons for calling the meeting of February 20, 1967, it is strange, indeed, that four of the top officials of Oblate College found it necessary to call a meeting to discuss menial tasks to be performed

by an employee to whom they expected to pay \$135.00 per week. If credibility was ever strained, it certainly is under considerable pressure in this instance. As to the alleged second purpose, namely, "to provide Father Martin Walsh the occasion of meeting Mr. McConville for purposes of evaluating his qualifications and determining whether Mr. McConville was the type of individual who would appropriately fit into the environment of a religious community", this, too, deserves more than cursory consideration.

If we accept this as a valid second reason, we are, of necessity, compelled, without any evidence of a probative value, to concede that Father Martin Walsh was endowed with some kind of supernatural power enabling him, within a space of a few minutes (he testified that this meeting was brief - D.'s App. 59), to evaluate Mr. McConville's qualifications and simultaneously therewith, determine that he was the type of individual "who would appropriately fit into the environment of a religious community." Other than this bland assertion by Defendant, the record is completely devoid of any proof in support thereof, and, the least the Defendant could have done, was to set forth the subjective criteria and standards employed by Father Martin Walsh in making such evaluation. It might well be asked, what was there about Mr. McConville that convinced Father Martin Walsh that he possessed the necessary qualifications to manage and operate his kitchen and that he was the type of

individual who would "appropriately fit into the environment of a religious community"? If we are to believe Defendant's first reason, namely, that, in effect, Mr. McConville was only a prospective employee who might eventually be hired, the officials of Oblate College required only a few minutes in which to hire him and to foreclose the consideration of any other prospective employee. Suffice it to say, however, within the space of one short week, and after allegedly hiring Plaintiff at a salary of \$135.00 a week, Defendant issued to him a check in the amount of \$1,295.00 and continued to do so for four consecutive weeks thereafter. Aside from the purely legal questions, or facts of a controversial nature, when Defendant's assertions as to the purposes for which the brief meeting was called, are tested in the light of adult conduct, they are not only incredible, they border upon the fantastic. Inasmuch as the substantive content of Defendant's Counterstatement hinges entirely upon the acceptance of its version of the facts surrounding the purposes for which the brief meeting of February 20, 1967, was called, an intelligent evaluation of Defendant's contentions cannot be made unless other factors of critical importance are also considered. Accordingly, therefore, such other factors, bearing directly upon the services expected of Plaintiff by Defendant are summarized hereinbelow.

For this purpose and to obviate any misunderstanding, the pertinent portion of Defendant's Pretrial Statement, filed in the Court below under date of March 6, 1970, is duplicated verbatim:

I. STATEMENT OF MATERIAL FACTS

A. Contract Agreement

On February 27, 1967, Plaintiff was retained by the Oblate College in the capacity of a food consultant.

The material provisions of the agreement between Plaintiff and the Oblate College are as follows:

1. Plaintiff was to assume responsibility for the overall management and operation of the kitchen and dining room facilities of the College. Such responsibilities expressly included the following:

- a. The hiring and supervision of all necessary kitchen and dining room personnel.
- b. The procurement of all food, materials, and other supplies necessary for the operation of the food facility.
- c. The preparation of three meals daily for a complement of approximately 65 seminarians and 25 resident clergy.

d. The preparation of prospective menus which were to be submitted for approval to a designated representative of the College.

e. The payment of all wages, salaries, and associated taxes of kitchen and dining room personnel.

f. The payment of all creditor accounts incurred in the operation of the dining and kitchen facilities.

g. The monthly submission of a verified expense statement to a designated representative of the College. Such statement was to contain a detailed listing of all expenditures incurred by Plaintiff pursuant to the execution of his responsibilities to the College during the preceding month.

h. The maintenance of the kitchen and dining room facilities in a clean and sanitary manner.

At this juncture, it must be remembered that the meeting was very brief, and, according to Defendant, no offer or proposal was made by any representative of the College to Mr. McConville at this meeting. (D.'s brief page 5; D.'s App. 17, 57, 58, 71).

It is singularly significant that other matters which, under Defendant's version of the contract, must have formed an integral

part thereof have been completely ignored by Defendant. Specifically, these matters are as follows:

(1) Since Defendant was hired as an employee at the rate of \$135.00 per week, with which official of the College and at what time was there any discussion concerning the withholding of taxes on Plaintiff's salary and the payment of Social Security and D. C. Unemployment taxes?

(2) With which official of Oblate College and at what time was there any discussion concerning the party responsible for the maintenance of the books and records concerning the withholding of taxes, Social Security and unemployment?

(3) With which official of Oblate College and at what time, was there any discussion concerning the responsibility, of either party, for the hiring of necessary personnel to serve three meals a day, seven days a week to sixty-five or seventy people?

(4) At what time and with whom is Plaintiff supposed to have had a discussion concerning the party responsible for the withholding of taxes, payment of Social Security and D. C. Unemployment Compensation benefits to the other employees so hired?

(5) What were all of the facts and circumstances under which Plaintiff was to assume the responsibility for the payment of foods and

supplies bought from various merchants and what were the instructions, if any, issued to Plaintiff regarding the relationship between Plaintiff and such merchants and whether or not Plaintiff was expected to make remittances to these merchants on a weekly, bi-weekly, or monthly basis?

(6) Inasmuch as the officials of Oblate College were well aware of the fact that Plaintiff maintained an office in their establishment and that he was trading as "James F. McConville Food Consultant" (Tr. 184-185, April 20, 22, 23, 1970) and that he had hired his own employees, what was the understanding between the parties whereby he was permitted to operate his business when, as claimed by Defendant, he was their employee at the rate of \$135.00 per week?

To repeat, Defendant says there was no offer or proposal made by any representative of the College to Mr. McConville on February 20, 1967. It is Defendant's contention that Plaintiff was hired by Father John Walsh after this meeting and during a tour of the kitchen. (D.'s App. 18, 19, 59, 60). Father John Walsh testified that he was not interested in financial arrangements and that the only thing in which he was interested was the menu (P.'s Brief 31). A minute examination of Father John Walsh's testimony fails to disclose that all of the foregoing matters were ever discussed between him and Mr. McConville

on the so-called tour of the kitchen. Moreover, if Father John Walsh was taking Mr. McConville on such a tour, at which time he was explaining the operation of the kitchen and its facilities, when did he find the time to discuss all of these other matters? The record is completely silent as to this. All that we have are the self-serving declarations of Defendant's witnesses. They never tell us when and under what circumstances these conditions were discussed and agreed upon. According to Defendant, they certainly were not discussed at the very brief meeting on February 20, 1967.

Superimposed upon all of the foregoing unanswered questions are two additional questions which, to date, Defendant has yet to explain. First, if Plaintiff was hired as an employee, the Defendant, as a matter of law, became his employer; that being so, why hasn't Defendant offered some plausible explanation for advancing \$1,295.00 each week in order to provide an employee with a cash flow to sustain his operation? As an employee, it could not have been Mr. McConville's "operation". It is virtually impossible to extract from the testimony of the officials of Oblate College any common sense understanding regarding:

(a) its advancements of \$1,295.00 a week

(b) the payment of an alleged \$135.00 per week to Plaintiff

which he was supposed to take "at the end of the month", and

(c) a so-called accounting at the end of each month.

It would have been far more sensible for their employee to assemble all of the monthly bills received from the food suppliers and then to notify the Bursar of the College who could then issue checks directly to such food suppliers. At the time the first check in the amount of \$1,295.00 was issued to Mr. McConville, the officials of Oblate College knew that he would deposit these funds in his own bank account; even a superficial appraisal of this fact should convince a reasonable person that the Defendant was not issuing checks payable to Mr. McConville as an employee with the understanding that he would deposit such funds in his personal bank account.

Second, although Defendant's records reflect entries under a column reserved for employees, Plaintiff's name was not entered under that column. Inasmuch as there was at least one person who was designated as an employee in Defendant's records, why was not Plaintiff so designated? To date, Defendant has failed to comment upon or to explain this undisputed fact.

If we are to believe Defendant's version as to when Mr. McConville submitted the sample budget, namely sometime after the meeting of February 20, 1967, and the terms of the hiring had already been concluded, it places Mr. McConville in a position of performing a

useless act. However, Father John Walsh testified that he remembered seeing that sample budget at that meeting (Tr. 13, 14, April 20, 1970).

As to that part of Defendant's Counterstatement of the Case relating to the so-called monthly statements, Plaintiff refers to pages 33, 39 of its original brief. In addition thereto, a careful scrutiny of Father John Walsh's testimony fails to reveal that he, in fact, testified that the hiring of Mr. McConville "was premised solely upon the understanding that Mr. McConville would submit statements of account on a monthly basis."

On page 9 of its brief, Defendant claims that "Absent the required statements there was no way the College could respond to the actual expenses of the operation." This statement has the effect of contradicting the testimony of Father Martin Walsh who testified that the average cost of breakfast, lunch, and dinner for one person per day was \$2.85. The officials certainly knew of the enrollment in their facility, as well as the number of its faculty, and, therefore, there certainly was a way in which the College could have responded to the actual expenses of its operation. Furthermore, and the record so demonstrates, payments were made at irregular intervals because, as Father John Walsh stated, "there was an account of sorts". (P's App. 29-34).

REPLY TO: "ARGUMENT"

In the first paragraph of its Argument, Defendant states that "The Court below sitting as the trier of fact was presented with two irreconcilable versions of the events leading to, and the terms of, Appellant's employment at the College as manager of the kitchen and dining facilities." Presumably, this statement is predicated upon an observation made by the Court below, viz., that Father John Walsh was called as a witness for the Plaintiff, when, in fact, Plaintiff made it quite clear that Father John Walsh was called as an adverse witness. Prior to trial, Defendant had designated Father John Walsh as one of its witnesses. The provisions of Rule 43 (b) Federal Rules of Civil Procedure permit a party to "...call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party..." (Addendum 1 a)

As Bursar of Oblate College, Father John Walsh was an officer thereof. The calling of Father John Walsh as an adverse witness is not tantamount to confronting the Court, to quote Defendant, "with two dramatically opposed and irreconcilable versions of the Plaintiff's case." In this regard, it is interesting to note that, prior to the

receipt of all of the testimony, and not withstanding the fact that undisputed documentary evidence preponderated heavily, in favor of Plaintiff, the Court below commented that this case was, "going to turn on the question of credibility" (Tr. 61, 62, April 20, 22, 23, 1970). Again, if the trier of facts elects to ignore undisputed documentary evidence without any explanation for so doing, and accepts contradictory oral testimony in lieu thereof, the only recourse available to the party adversely affected is, of course, the pursuit of his appellate remedies. At this juncture, it seems appropriate to incorporate the following editorial comment. Prior to instituting this suit against Oblate College, Plaintiff was fully aware of the discretion with which the trier of facts is vested in evaluating the credibility of witnesses; Plaintiff was equally cognizant of the fact that, where the resolution of litigation rests solely upon verbal testimony that, under such circumstances, and, as a practical matter, the filing of a suit against a religious order, such as Oblate College, could well be characterized as the "height of folly".

One has only to read the rather abbreviated closing argument of Defendant's counsel to conclude that, in defending against Plaintiff's claim, Defendant relied entirely upon the impregnability of the credibility of its witnesses. This same posture of impregnability manifests

itself throughout Defendant's brief; by reference to pages 12 through 18 thereof, it will be found that Defendant lays great stress upon the oral testimony of its witnesses. It should also be noted, however, that, at no time did Defendant make the slightest reference to the fact that, with its full knowledge and consent, Plaintiff was conducting a business in one of its facilities and that, in so doing, Plaintiff complied with all laws and regulations, both local and Federal, relating to and involving such business, while, on the other hand, and if Defendant is to be believed, it failed to abide by the laws and regulations under which it had a clearly defined obligation. Thus, even as to this, Defendant has adroitly avoided making any comment whatever. Simply stated, it is singularly significant that, throughout its entire brief, Defendant has neither alluded to nor offered any explanation concerning its failure to withhold taxes on Plaintiff's wages or to make contributions for his benefit under the Federal Insurance Contributions Act or under the D. C. Workmen's Compensation Act. Plaintiff respectfully submits that, all of these matters deserve a forthright explanation on the part of Defendant. Such matters would also serve as an excellent opportunity for a true evaluation of the credibility of Defendant's witnesses. Until such explanation is forthcoming, Appellee's claim that "an appraisal of the evidence proffered below will clearly demonstrate

that the findings of the Court are not 'clearly erroneous' but, on the contrary, supported by substantial testimonial and documentary evidence of record" is completely devoid of any merit whatever.

REPLY TO: "EVENTS LEADING TO MR. McCONVILLE'S
MEETING WITH COLLEGE OFFICIALS"

In this part of Defendant's brief, Defendant confuses evidence with theory; specifically, on page 15 of its brief, Defendant alleges, "Appellant (sic. Appellee) would also note at this point that a third theory concerning the hiring of Mr. McConville by the College now appears in Appellants Brief for the first time." The fact that Plaintiff testified that Father Richard Murphy represented to him that this "...would be an excellent opportunity for him to go into business for himself..." does not mean that Plaintiff has introduced "a third theory concerning the hiring of Mr. McConville by the College" and that this theory "now appears in Appellants Brief for the first time". Candidly speaking, Defendant has either misconceived or has simply misunderstood Plaintiff's testimony as it related to his preliminary discussions with Father Richard Murphy, which transpired many weeks prior to February 20, 1967; Plaintiff testified that when he was approached by Father Richard Murphy concerning the possibility of his taking over the operation at Oblate College, Father Murphy stated that this would be

an excellent opportunity for Plaintiff to go into business for himself. This appealed to Plaintiff and induced him to resign his position in the cafeteria of the Shrine of the Immaculate Conception. This is precisely the thrust of Plaintiff's case; most assuredly it is not a third or even a second theory because, and the record so shows; Plaintiff has continuously maintained only one theory, namely that he was an independent operator and that he was conducting a business trading as "James F. McConville Food Consultant". This was designated on his checks in payment for foods purchased from various merchants and this is the basis on which at least two such merchants instituted suits against Mr. McConville instead of Oblate College; such claim by Appellee finds no support in the record. Defendant's contention that this was an "alternative theory" is equally baseless.

REPLY TO: "THE MEETING"

In this portion of Defendant's brief, it merely re-states Plaintiff's testimony concerning the meeting held with the officials of Oblate College on or about February 20, 1967, and then recounts the oral testimony of three officials of Oblate College in refutation thereof. Two of the allegations appearing on pages 18 and 19 of Defendant's brief deserve more than cursory consideration.

First, Defendant avers that "Without qualification each of these three witnesses testified: that Mr. McConville did not present either a 'contract' (sample budget), a sample menu or any other documentation to any participant of that meeting..." In support of that categorical claim Defendant refers to pages 17, 57-59, 69-71 of its Appendix; by reference to Appendix 17 there was no mention of the sample budget; by reference to page 59 there was no mention of a sample budget; by reference to page 71 there was no mention of a sample budget; when reference is made to pages 13 and 14 of the transcript dated April 20, 1970, it will be found that Father John Walsh testified as follows:

By Mr. Simpson:

Q. "Father, I show you Plaintiff's Exhibit No. 1 for identification and ask you if that is the budget that Mr. McConville submitted to you or to the group some time in February, 1967?"

A. "Yes, I recognize that -- there was a sample budget at the time and I believe also that there was a menu, but as far as this was concerned, this didn't concern me at all - I was not interested. The menu, I believe, was the main thing I was concerned about because our agreement had already been made as regarding salary and this budget was not salary included." (Appellant's brief 21-22).

Second, Defendant states: "It should also be noted that both Father John Walsh and Father Murphy testified that the first time they saw the sample budget was at the commencement of this litigation." In support of this allegation Defendant quotes Appendix 56, 57, and 69. With reference to Appendix 56 there is no reference to a sample budget; by reference to Appendix 57 it is found that only Father Martin Walsh testified that he saw the sample budget "when this litigation was enjoined". By reference to Appendix 69, it was Father Richard Murphy who testified that the first time he saw the sample budget was, "when Mr. Simpson called me on the phone and said that Mr. McConville was entering a suit against the college". According to Father John Walsh, he testified that there was a sample budget presented at the time of the meeting held with the group sometime in February, 1967. Not only has Defendant confused the kind of testimony presented by witnesses testifying in its behalf, Defendant has also erroneously designated pages in its Appendix. The finding of the Court below that "the sample budget was presented to the Bursar of the College by Mr. McConville subsequent to his hiring" is patently inconsistent with the Bursar's testimony.

REPLY TO: "THE DOCUMENTARY EVIDENCE
BEFORE THE COURT BELOW"

First of all, it should be noted that the Defendant has erroneously used the word "contemporaneous" as "contemptuous". If Plaintiff is permitted a facetious comment, it would be that Defendant has shown contempt for certain uncontradicted documentary evidence. Because Defendant has shown such utter disregard for this documentary evidence, one would not be without cause to wonder if this was, in fact, an error.

When Appellee suggests that "an objective evaluation of the documentary evidence in conjunction with the testimony of the representatives of the College will show not only that there exists no conflict but, on the contrary, that the documentary evidence forcefully corroborates the testimony presented on behalf of the College", Appellant is compelled to marvel at the sheer audacity of this contention. Can it be that Defendant really believes that the documentary evidence establishing that Plaintiff secured a Business Tax Registration Number and that the District of Columbia issued to him an Unincorporated Business Franchise License and that the Plaintiff obtained a Certificate certifying that he had secured payment of compensation in compliance with the District of Columbia Workmen's

Compensation Act and that Plaintiff was listed in the Chesapeake & Potomac Telephone Directory as "Food Services and Consultant" "forcefully corroborates the testimony presented on behalf of the College"? A reasonable interpretation of such documentary evidence, coupled with Defendant's failure to comply with the law, overwhelmingly corroborates Plaintiff's testimony and forcefully establishes the theory upon which his claim is predicated.

REPLY TO: "1) THE SAMPLE BUDGET"

Nothing contained in this part of Defendant's brief supports its contention that the sample budget "forcefully corroborates the testimony presented on behalf of the College".

On page 21 of its brief, Defendant states, "According to the Plaintiff's theory of the case the acceptance and approval of the above document committed the College to a total payment to Mr. McConville of \$63,740.00 over a period of one year." Although it is not of particular importance, Defendant's calculation that the total payment to Mr. McConville would amount to "\$63,740.00 over a period of one year" is incorrect; it should be \$67,340.00. Plaintiff responds to this allegation by inquiring as to what significance can this possibly have in demonstrating that the sample budget "forcefully corroborates the testimony presented on behalf of the College"? According to Defendant's

own calculation, it computed the average cost of food at the rate of \$2.85 per person per day or approximately \$1,295.00 per week; a simple arithmetic computation, using Defendant's figures and by multiplying \$1,295.00 by fifty-two (52) weeks, a product of \$67,340.00 is readily determined.

Apparently the relevancy which Defendant attaches to the variation in the resident population of the College insofar as the sample budget is concerned, is the fact that, according to Defendant's version, was "the first awareness that Mr. McConville had concerning the varying population during the summer months and the special events at the College came after he claims to have presented the 'contract' (sample budget) to the College officials." In support of this claim, Defendant cites pages 33-37 of its Appendix. By reference to these pages of Defendant's Appendix, it is not established, as a fact, that this was "the first awareness that Mr. McConville had concerning the varying population during the summer months". Defendant overlooks the fact that Plaintiff had had three years experience working at the Shrine of the Immaculate Conception and that he had ample opportunity to become familiar with feast days and special events. Moreover, Plaintiff had testified that, in his personal discussions with Father Richard Murphy, he would be required to serve approximately sixty-five to

seventy persons per day and this is the basis upon which Mr. McConville prepared his sample budget. During the meeting on the 20th of February, 1967, the officials informed him of the drop in the population during the summer months and their needs on feast days and special events. The record shows that Mr. McConville was still willing to proceed on the basis of \$1,295.00 per week (D.'s App. 36, 37). If Plaintiff had entered into a "bad contract" why should this be of any concern to Defendant? The fact that the "...express authority of Father Martin Walsh, as Superior, to enter into contracts was limited to \$500" and that "The contractual commitment of College funds exceeding \$500 required written authorization from provincial authorities in Boston", is of no legal significance whatever. In fact, when the Court below inquired of Father Martin Walsh as to his authority to make payments for food in the amount of \$1,295.00 per week, Father Martin Walsh testified that he had the authority to do so. (Tr. 83-84, April 20, 22, 23, 1970)

REPLY TO: "2. THE FIVE COLLEGE CHECKS
IN THE AMOUNT OF \$1295"

While it is true that Appellant urges upon this Court "to construe (not construct) the issuance of the five checks, each in the amount of \$1295, during the first five weeks of Mr. McConville's tenure at the College as strong corroboration of the existence of the alleged contract",

it is not true that the, "testimony of record establishing that each of the five checks were issued pursuant to any (sic. an) arrangement reached between Father John Walsh and Mr. McConville, after Mr. McConville's hiring, whereby the College would undertake to advance monies to satisfy the day to day expense of the operation"; there was no arrangement between Father John Walsh and Mr. McConville concerning the payment of \$1,295.00 each week for five (5) consecutive weeks. Father John Walsh testified unequivocally that each of these payments was "purely coincidental" or that they "were arbitrary". (Tr. 27, 28, 29, 31, 33, 35, 39, April 20, 1970)

It is deemed advisable to quote verbatim a statement commencing at the top of page 24 of Defendant's brief: "The amount of money advanced during this first five week period was based upon the estimation evidenced in the sample budget which was made up by Mr. McConville, which, in turn, was based upon costing information supplied by Father John Walsh." When this statement is subjected to critical examination, a most unusual development occurs; specifically, Defendant says that the amount of money advanced during the first five (5) week period (\$1,295.00 each week) was based upon the sample budget made up by Mr. McConville which, in turn, according to Defendant, was prepared "upon costing information supplied by Father John Walsh". When pages 18 and 19 of Defendant's brief are considered in conjunction with the

statement appearing at the top of page 24 of its brief, it is found that Defendant has adopted two diametrically opposite positions. On pages 18 and 19 Defendant claims that "Without qualification each of these three witnesses (Father Martin Walsh, Father Richard Murphy, and Father John Walsh) testified: that Mr. McConville did not present either a 'contract' (sample budget), a sample menu, or any other document to any participant of that meeting" and that "both Father John Walsh and Father Murphy testified that the first time they saw the sample budget was at the commencement of this litigation. " Therefore, if Father John Walsh did not see the sample budget until the commencement of this litigation, how could he have utilized the sample budget made up by Mr. McConville for the purpose of advancing the sum of \$1,295.00 a week commencing on the 27th day of February, 1967, as claimed by Defendant at the top of page 24 of its Brief?

It is true that Appellant calls this Court's attention to the fact that the sample budget makes no provision for the salary of Mr. McConville at the rate of \$135.00 per week, but Defendant's attempt to explain this away by reference to the operating statements fails in its purpose. On the one hand, Defendant represents to this Court that the money advanced to Plaintiff for the first five (5) weeks, that

is \$1,295.00 per week, was based upon the estimation in the sample budget prepared by Mr. McConville, and yet, on the other hand, Defendant represents to this Court that the sum of \$1,295.00 per week had been calculated upon the basis of averaging the cost of \$2.85 per person for three meals a day and that by multiplying this sum by sixty-five persons by seven days a week Defendant reached a figure of \$1,296.75 per week which it "levelled off" to \$1,295.00. (P. 's App. 25, 26). If we are to believe Father Martin Walsh, who made these computations, they related to the cost of food and did not include the payment of Plaintiff's salary or any other incidental expenses. Plaintiff submits that in order to circumvent the damaging effect which an admission of the knowledge and existence of the sample budget at the meeting held on February 20, 1967, would have upon Defendant's defense, Defendant found it necessary to reconstruct the manner in which the sum of \$1,295.00 was determined; by so doing, Defendant was unable to include in such reconstruction any allowance for Plaintiff's alleged salary or those of his employees. Consequently, Defendant is faced with the dilemma in which it now finds itself. When it suits its purpose, Defendant claims that they had no knowledge of and did not see the sample budget until the commencement of this proceeding; when it suits its purpose to do so, Defendant says that the five (5) weekly payments of \$1,295.00 each were based upon the sample budget which, in

turn, was based upon costing information given to Plaintiff by Father John Walsh. In this regard, it must be remembered that Father John Walsh said that the weekly payments were "coincidental" to the sample budget or that they were merely "arbitrary advances". If they were arbitrary advances they could not be based upon "costing information" supplied by him to Mr. McConville.

REPLY TO: "3. THE MONTHLY
OPERATING STATEMENTS"

Defendant claims that "A total of nine expense statements were submitted to the College by Mr. McConville during the period February 27, 1967, to January 9, 1968." Defendant neglected, however, to state that, except for the statement covering the first five (5) weeks (gratuitously submitted by Plaintiff to Defendant), all of these statements were not prepared until approximately the 5th day of December, 1967, at which time Plaintiff engaged the services of Thomas J. Stemmy & Associates, Tax Consultants, for this purpose. Plaintiff testified that he finally yielded to Defendant's demands for these monthly statements because of Defendant's refusal to pay sums due and owing to him until he complied with such demands. (Tr. 8, April 20, 22, 23, 1970 - Note: There are two separate pages on the transcript each of which is numbered "8"; the relevant page 8 contains the cross-examination of Plaintiff by Counsel for Defendant).

Without any support for so alleging, Defendant claims that each of these statements, "delineated Mr. McConville's operating expenses including his own salary, for a one month period." Defendant refers to pages 77-87 of its Appendix; by reference to the document set forth on page 25 of Defendant's brief, attention is directed to the fact that the sum of \$750.00 opposite Mr. McConville's name is not designated as salary. In fact, it bears no description whatever. The fact that Plaintiff drew \$150.00 per week from his business does not justify Defendant's characterization that this represents Plaintiff's "salary". Furthermore, if Plaintiff had considered himself to be an employee at \$135.00 per week, it certainly would have been most imprudent of him to pay himself a salary of \$150.00 per week within such a short time after he had been hired as an employee and then to present his employer with evidence that he was violating the terms of his employment. Defendant is also reminded that this was a new undertaking for Plaintiff and his actions show that he was endeavoring to exercise some degree of caution in the early stages of his operation. In addition thereto, it should also be remembered that, for many years prior thereto, Plaintiff had worked for wages as an employee and, by reason thereof, he was obliged to arrange his personal affairs under a fixed budget. When Defendant failed to make payments in accordance with its agreement, that is, by reducing the weekly payments from \$1,295.00 per

week to \$1,200.00, prudence dictated that Plaintiff reduce his draw accordingly. During the three previous years, Plaintiff had budgeted his living expenses on a salary of \$135.00 per week; accordingly, therefore, there was no reason why he could not do so again if circumstances so dictated. We have only Father John Walsh's testimony that when he allegedly "confronted Mr. McConville and demanded an explanation as to why he was paying himself a salary of \$150 per week when he had been hired at the rate of \$135 per week" that "Mr. McConville responded that although he thought he should receive more he would revert to the amount of the original agreement." The testimony presented by Father John Walsh is not only contradictory, it is also extremely vague and confusing; there is ample support in the record for so stating. The trial judge found his testimony confusing. (P.'s Brief 21, App. 16). In view of this, Father Walsh's recollection of a conversation between Mr. McConville and himself three years prior to his testimony is certainly of doubtful validity.

The contents of the first paragraph appearing on page 28 of Defendant's brief require clarification. Specifically, Defendant states that "on cross examination he (Mr. McConville) was asked for an explanation of how he could 'draw' \$540 a month from the operation when the additional statements he submitted (P.'s Exh. 32 - App. 78-85)

indicated a loss or negative 'profit'. By reference to the citations of the record referred to by Defendant, there is nothing contained therein supporting Defendant's contention that Plaintiff was asked for an explanation on cross examination regarding the draw of \$540.00. Furthermore, a brief examination of the transcript likewise fails to support Defendant's contention that Plaintiff was asked for such an explanation. As to that part of Defendant's brief regarding Mr. McConville's testimony, "that he had not looked at the statements prior to submitting them to the College", attention is directed to the fact that the statements prepared by Thomas J. Stemmy & Associates were delivered directly to Oblate College (D.'s App. 78). It is an established fact that Mr. McConville did not personally prepare these statements and there is every reason to believe that Mr. McConville did not see or examine them prior to their submission to Oblate College. Accordingly, Mr. McConville's statement that he did not look at the financial statements does not necessarily lead to the conclusion that his testimony "strains reason".

Notwithstanding all of the evidence relating to the financial statements, the information contained therein related to the private business affairs of Mr. McConville and were obtained by the officials of Oblate College by means of financial coercion exerted upon the

Plaintiff. Inasmuch as Defendant lays so much stress upon the monthly financial statements, it is well to note that the amount allocated to Mr. McConville in each of these monthly statements was never designated as "salary". Instead of the word "fee" appearing in these statements, Thomas J. Stemmy & Associates could have more properly used the word "draw". As tax consultants they certainly knew that the payment of fees by an employer to an employee required adjustments for withholding taxes, Social Security contributions, unemployment compensation, and yet, not one of the monthly statements contains any entry as to these most vital matters. If, on the other hand, Plaintiff was a sole proprietor, there would be no necessity for recording withholding taxes, Social Security contributions, etc. Following the submission of these statements to the Defendant, it did not raise any question concerning the omission of entries relating to withholding taxes, Social Security contributions, etc.; for that matter, Defendant has never mentioned them to this day.

REPLY TO: "4. SUBSEQUENT EMPLOYMENT
APPLICATION OF THE APPLICANT."

Relative to the application submitted by Plaintiff seeking employment at Cleaves Food Services Corporation (D.'s Exh. 2), the Court below, over objection of counsel for Plaintiff, admitted

this document into evidence and it did so after excusing the officer of Cleaves Food Services Corporation, who requested Plaintiff to submit this application, from testifying; by so doing, Plaintiff was denied the right of cross examination. Despite this, however, an examination of Defendant's Exhibit 2 unquestionably establishes that Plaintiff conducted his business at Oblate College as a sole proprietor. As stated in this application, Plaintiff's reason for leaving his employment at the Shrine Cafeteria was "to try operation of my own". (D.'s Exh. 2, App. 89). The clear import of that statement is that Plaintiff left his employment at the Shrine Cafeteria for the purpose of entering business for himself. Inasmuch as Defendant introduced this evidence, it can not, under the rules of evidence, contradict its own testimony. Moreover, Defendant is bound thereby and such evidence establishes that Plaintiff was, in fact, conducting a business as a sole proprietor. As stated in Stancil v. Mills & Export Co., Texas Civil Appeals 146 SW 2nd, 787 (1940) at page 787-788, the Court stated, "One introducing documentary proof bearing upon an issue vouches for its accuracy so far as that issue is concerned and is, as a general rule, bound by its recitals for all purposes." Other authorities to the same effect are found in Volume 29, American Jurisprudence 2nd Ed. Evidence §840, page 932 and Volume 32 A

Corpus Juris Secundum Evidence §775, page 92. The pertinent section of Volume 29 American Jurisprudence 2nd Ed. is quoted verbatim herewith: "A party frequently finds it necessary to introduce a document as a foundation of further proof relating to such document in order to sustain a matter in issue. Such a party is not absolutely bound by the terms of the document so as to prevent him from introducing further testimony relating thereto, in order to show its connection with the matter in dispute. However, if the documentary evidence is introduced for the purpose of proving or rebutting proof of a particular issue or issues, the general rule that one is bound by its recitals applies." The relevant portion of Volume 32 A Corpus Juris Secundum, §775, page 92, is quoted verbatim herewith: "Where a document is introduced for the purpose of impeaching a statement of fact therein, and the party fails so to impeach it, all material facts alleged in the document are presumed to be true and the party introducing it is bound thereby."

REPLY TO: "D) INDEPENDENT CONTRACTOR
OR EMPLOYEE RELATIONSHIP"

The fact that, to quote Defendant, "the record is replete with testimony stating that it was expressly understood that Mr. McConville's hiring or employment as manager of the College kitchen was strictly on

a trial basis", does not negate the principal of law expressed by the Supreme Court of the United States in United States v. United States Gypsum Co., 68 S. Ct. 525; 333 U. S., 364 (1948).

Peculiarly enough, throughout its brief, Defendant avoided discussing or commenting on the law so clearly enunciated by the United States Supreme Court in that case.

Even if we accept the trial judge's Finding that Mr. McConville was an employee, on a trial basis, under a contract terminable at will, his Finding that Plaintiff was not entitled to recovery is clearly erroneous. In his original brief, page 12 thereof, Plaintiff set forth evidence demonstrating that, even as an employee, Plaintiff would be entitled to a minimum of \$135.00 per week for a period of forty-one (41) weeks, or a total of \$5,535.00; as demonstrated on page 10 of Plaintiff's original brief, the net amount actually received by Plaintiff from Defendant aggregated only \$1,828.92. If Defendant is given credit for this latter amount, it would still owe to Plaintiff the sum of \$3,706.03. Therefore, as a matter of basic arithmetic, the Finding of the Court below is clearly erroneous. If Plaintiff was truly regarded by Oblate College as an employee, why was not Plaintiff designated as an employee in the books and records of Oblate College? Defendant found no difficulty whatever in designating Annie Brown as an employee (P.'s Exh. 30, lines 9, 17, and 26, App. 78, under the last column identified as "Employees").

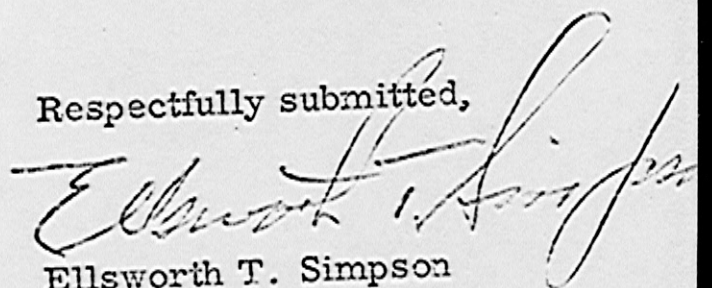
CONCLUSION

In its brief, Defendant creates the impression that the meeting between Mr. McConville and the officials of Oblate College was called for the purpose of affording these officials an opportunity, first of all, to enumerate all of the things it would demand of Plaintiff as an employee and, secondly, to determine whether or not Plaintiff was worthy of the privilege of working for Defendant wherein he would be responsible, as an employee, for the procuring, preparing, and serving of three meals a day, seven days per week, to sixty-five to seventy people and, on special occasions, to approximately two hundred and fifty persons, and to guarantee payment to Defendant's creditors, the hiring, supervising, and payment of wages to four other employees, including withholding of taxes, payment of Social Security and unemployment benefits at a weekly wage of \$135.00. Defendant demanded all of these things of Plaintiff without a single promise in exchange therefor. Defendant did not even guarantee to Plaintiff that he would, in fact, receive the sum of \$135.00 per week. In this regard, it should be remembered that, according to Defendant, it determined its cost of food to be \$1,295.00 per week, that is \$2.85 per person for sixty-five people for seven days, or, $\$2.85 \times 65 \times 7 = \$1,296.75$ (supposedly "levelled off" to \$1,295.00). If Defendant's

testimony in this regard is accepted, it becomes unmistakably clear that Defendant made no provision in its calculations for the payment of \$135.00 per week to Plaintiff, exclusive of the fact that Plaintiff was under a legal obligation to pay the weekly wages of four other employees.

Crystallizing all of the facts of a substantive nature, particularly those representing and relating to uncontroverted documentary evidence, it becomes eminently clear that a contract had been entered into between Mr. McConville and Oblate College whereby the former agreed to provide all of the essential services in operating his business as a food consultant for the stated sum of \$1,295.00 per week for a period of one year and that Defendant breached this contract thereby entitling Plaintiff to damages in the amount of \$16,357.49. In any event, however, and even though this Court should hold that Plaintiff was an employee at the will of the Defendant, Plaintiff is entitled to recover at least the sum of \$3,706.08 with interest thereon, with costs here and in the Court below to Plaintiff.

Respectfully submitted,



Ellsworth T. Simpson
Counsel for Appellant
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815 - Fifteenth Street, N.W.
Washington, D. C. 20005

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ADDENDUM

FEDERAL RULES OF CIVIL PROCEDURE

Rule 43

(b) Scope of Examination and Cross-Examination.

A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.

FILED FEB 24 1972

PETITION FOR REHEARING

Nathan J. Paulson
CLERK

IN THE
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 24,601

JAMES F. McCONVILLE, Appellant,

v.

OBLATE COLLEGE, Appellee.

Appeal from the United States District Court for the
District of Columbia

Ellsworth T. Simpson
815 - 15th Street, N.W.
Washington, D.C. 20005
Counsel for Appellant

IN THE
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 24,601

JAMES F. McCONVILLE, Appellant,

v.

OBLATE COLLEGE, Appellee.

Appeal from the United States District Court for the
District of Columbia

PETITION FOR REHEARING

To the Honorable Judges of the United States Court of Appeals for
the District of Columbia Circuit.

Pursuant to the provisions of Rule 40 Federal Rules of
Appellate Procedure, the Appellant herein petitions for a rehearing
and shows to this Honorable Court the following facts:

1. On February 10, 1972, this court, without opinion, affirmed
the judgment of the United States District Court for the District of
Columbia entered on April 30, 1970.

2. On June 13, 1969, Appellant instituted suit against Oblate
College, the Appellee herein, seeking recovery of damages for breach

of contract. This suit was predicated upon Appellant's claim that he was an independent contractor.

3. Trial was held in the court below without jury. Documentary evidence introduced on behalf of Appellant supported his claim that he was conducting his business as an independent contractor.

4. In the court below, considerable oral testimony was adduced by both parties. The record establishes that such testimony conflicted with documentary evidence presented by Appellant.

5. The findings of fact which are clearly erroneous are as follows:

(a) "The Court further finds that the Defendant did not pay all of the bills he incurred and it has been stipulated between the parties, and the Court finds, that the Defendant made indirect payments for and on behalf of the Plaintiff in the amount of \$5,364.68."

(Appellant's Appendix, P. 11)

(b) "It has been stipulated, further, and the Court finds, that during this same period of time the Defendant made direct payments to the Plaintiff in the amount of \$37,847.83. When this amount is added to the indirect payments of \$5,364.68 it becomes clear that the defendant has paid to the plaintiff or on behalf of the plaintiff a total sum of \$43,212.51, and the parties have so stipulated, and the stipulation is part of the record." (Appellant's Appendix, Pp. 11-12)

(c) "The evidence shows that the arrangement between

the plaintiff and the defendant continued in existence for a period of 46 weeks. The plaintiff was absent for five weeks from mid-October through November 1967, and presented no statements either for reimbursement or salary during that period, or for the month of October 1967. On the basis of this record, therefore, he has to be compensated for forty one weeks at the rate of \$135 per week - an amount which the Court finds to be \$5, 535.00." (Appellant's Appendix, P. 12)

(d) "When this amount is added to the expenditures and obligations made by the Plaintiff, the Court determines that the total amount due to Plaintiff for reimbursement plus compensation, during the period between February 26 1967 and January 15 1968 is \$40, 984.43." (Appellant's Appendix, P. 12)

(e) "It is clear, therefore, that with these figures which the Court finds to be the obligations herein, there is no amount that is due and owing to the plaintiff from the defendant." (Appellant's Appendix, P. 12)

ARGUMENT

Assuming arguendo, that it was within the sound discretion of the trial judge to accept oral testimony in preference to contemporaneous documentary evidence, the trial judge, nevertheless, was clearly in error in finding, as a fact, that Appellant stipulated that he received the sum of \$5, 364.68 as an employee (underscoring supplied).

Each of the court's findings, as hereinabove set forth, must be viewed in their entirety inasmuch as their total impact bears directly upon a crucial issue involving a finding of fact which is clearly erroneous.

As previously stated, the complaint filed by Appellant was predicated upon his claim that he was an independent contractor and not an employee. Accordingly, therefore, the stipulation to which the trial judge referred namely, "that the Defendant made indirect payments for and on behalf of the Plaintiff in the amount of \$5,364.68" would only be binding upon the Appellant in the event the court below held that Appellant was an independent contractor. At the time Counsel for Appellant entered into this stipulation in Judge Waddy's Chambers, immediately preceding trial, it was on the basis that Appellant was an independent contractor conducting business as a food concessionaire as alleged in the complaint. The language contained in that complaint makes no reference to employer, employee, wages or salaries. The sum of \$5,364.68 representing cost of food consumed by Appellee and the wages incurred in the serving thereof was, if Appellant is held to be an employee, of no benefit to him either directly or indirectly. Such an expenditure could only be chargeable to him in the event he is regarded as an independent contractor.

By converting Plaintiff's claim into a suit for wages, the court improperly utilized a stipulation that was unrelated to the court's sub-

sequent finding that Plaintiff was an employee. By reason thereof, Plaintiff's rights have been substantially impaired and the results reached by the court below are clearly erroneous. Moreover, a serious question arises as to whether or not Plaintiff has been denied substantive due process; Foster v. Illinois, 332 U.S. 134; 91 L. Ed. 1955, decided October term 1946. While that case involved the provisions of the 14th Amendment as they relate to "due process", the provisions of the 5th Amendment are equally applicable to the question of due process in federal cases.

Plaintiff's complaint is based upon a contractual relationship between two independent contractors and not upon an employer-employee relationship. In its answer, Defendant merely denied the affirmative allegations set forth in the complaint.

By reason of its finding viz., that, "it matters not whether the Plaintiff was an independent contractor or an employee", the court below failed to resolve the issue presented for its determination. Inasmuch as suits have been filed in other courts (District of Columbia and the State of Maryland) wherein Plaintiff has been held to be an independent contractor and therefore liable for food consumed by the students and faculty of Oblate College, it matters a great deal to Plaintiff as to whether his legal status is that of an independent contractor or that of an employee.

In affirming the judgment of the court below, this court has held that Plaintiff was an employee at the will of the Defendant and that, as such, he is liable for the debts incurred by his employer. It is apparent, of course, that such holding is inherently inconsistent and therefore repugnant to basic concepts of judicial fairness.

Not only are the pertinent findings of fact of the court below, which have been affirmed by this court, clearly erroneous, the ruling in the present case seems to be at variance with the principles of law expressed by the Supreme Court of the United States in United States v. United States Gypsum Company decided March 8, 1948; 68 S. Ct. 525; 333 U.S. 364. A relevant portion of the decision in that case is quoted herewith verbatim: "...where such (oral) testimony is in conflict with contemporaneous documents we can give it little weight particularly when the crucial issues involve mixed questions of law and fact". The import of that language seems to be that trial courts are admonished to give greater weight to documentary evidence than to oral testimony. The court below, made no reference to documentary evidence, which, as the record shows, supported Plaintiff's claim; presumably the court below attached no weight whatever to such documentary evidence.

While the following facts, admittedly, are not controlling in this proceeding, they, nevertheless, illustrate the unique position into which Plaintiff has been placed. Specifically, National Hotel

Supply Company, Inc., a local firm, delivered meat products to Appellee's facility for which Appellant gave his promisory note in the amount of \$325.16. Judgment was entered against Plaintiff in the District of Columbia Court of General Session (Plaintiff's exhibit 37: Appellant's Appendix, p. 93). The products thus delivered were consumed by students and faculty of Oblate College. Embassy Dairy, another local firm which delivered dairy products to Appellee's facility obtained a judgment in the Circuit Court for Prince George's County Maryland against Appellant on the grounds that he was an independent contractor. Judgment has been entered against Appellant in that court in the amount of \$463.44 (Plaintiff's exhibit 38: Appellant's Appendix, p. 94)

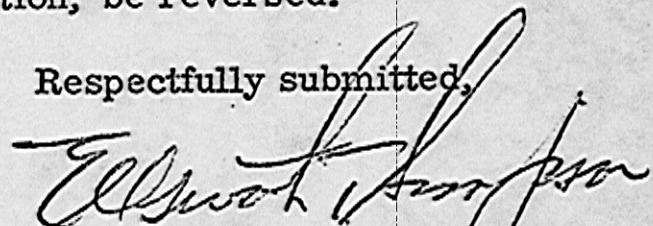
CONCLUSION

Inasmuch as Plaintiff had not instituted his suit seeking recovery of unpaid wages and since Defendant's answer contained simple denials of the allegations set forth in the complaint, the finding of the court below, affirmed by this court, that Plaintiff was an employee at the will of the Defendant has the effect of reversing the basis on which Plaintiff's claim is predicated. In addition thereto, the court below employed a stipulation which was totally irrelevant to the court's subsequent finding that Plaintiff was an employee. The arithmetic computations employed by the court below, and affirmed by this court, are patently incorrect. Even as an employee, Plain-

tiff is entitled to unpaid wages of not less than \$3,706.08. Accordingly, therefore it is unmistakably clear that the trial court erred in finding that Appellant stipulated that the sum of \$5,364.68 was paid for his benefit and by reason of this erroneous finding this court has inadvertently misapprehended the facts in affirming the judgment of the court below.

WHEREFORE, the premises considered, Appellant respectfully requests that this court grant this petition for rehearing and that the judgment of the United States District Court for the District of Columbia upon further consideration, be reversed.

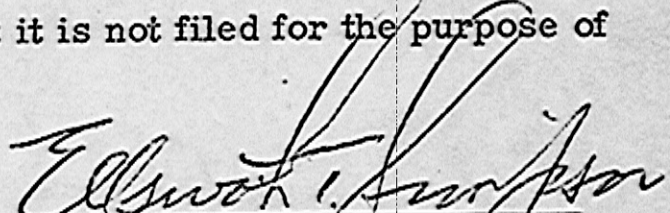
Respectfully submitted,



ELLSWORTH T. SIMPSON
Attorney for Appellant
815 Fifteenth Street, N.W.
Washington, D.C. 20005

CERTIFICATE OF COUNSEL

I hereby certify that I have examined the foregoing petition, and that, in my opinion, it is well founded and entitled to favorable consideration of this court and that it is not filed for the purpose of delay.



ELLSWORTH T. SIMPSON
Attorney for Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

JAMES F. McCONVILLE,)

Appellant)

v.)

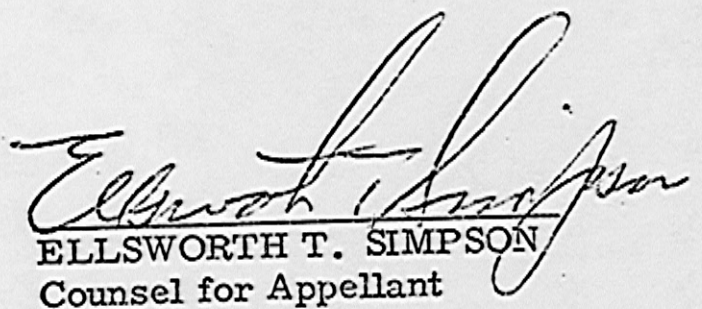
OBLATE COLLEGE,)

Appellee)

CASE NO. 24, 601

CERTIFICATE OF SERVICE

I hereby certify the two copies of Petition for Rehearing were mailed, postage prepaid this 24th day of February 1972 to Thomas L. Delaney, Esquire, 5007 - 44th Street, N.W., Washington, D.C. 20016 and to Donald O. Lincoln, Esquire, 1001 Connecticut Avenue, N.W., Washington, D.C. 20036, Counsel for Appellee.


ELLSWORTH T. SIMPSON
Counsel for Appellant

